

No. 17591

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANLEY E. HENWOOD, RICHARD I. ROEMER, LEWIS M. POE,
individually, as members of the UNITED INDUSTRIAL CORPORATION STOCKHOLDERS' PROTECTIVE COMMITTEE and as proxies of said Committee, JAMES V. ARMOGIDA, ROBERT G. BALLANCE, FRED A. BESHARA, NATHANIEL R. DUMONT, JOE L. FOSS, WILLIAM D. LAWRY, ELMER M. LUTHER, JR., EDWARD H. McLAUGHLIN, CHARLES SODERSTROM, JOHN A. STEEL, CLARENCE L. SUMMERS, ROY L. WILLIAMS, LOUIS W. WULFEKUHNER, ALFRED T. ZODDA, individually and as members of the UNITED INDUSTRIAL CORPORATION STOCKHOLDERS' PROTECTIVE COMMITTEE,

Appellants,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Appellees.

Appeal From the United States District Court for the
Southern District of California, Central Division.

OPENING BRIEF OF APPELLANTS.

VAUGHAN, BRANDLIN, BAGGOT,
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FILED
JUL 13 1967
FRANK H. SCHMID, CLERK

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OPENING BRIEF OF APPELLANTS.

JURISDICTION.

This action was brought by the Securities and Exchange Commission (hereinafter referred to as "SEC") for alleged violations on the part of the Appellants of Section 14, subsection (a) of the Securities and Exchange Act of 1934, 158 USC 78 n., subsection (a) and of Regulation 14, 17 CFR 248.14 promulgated thereunder.

The plaintiff SEC requested an injunction against the Appellants, pursuant to Section 21, subparagraph (e) and (f) of the Securities and Exchange Act of 1934, enjoining them from any future violations of the Act.

The jurisdiction of the United States District Court was based upon Section 27 of the Securities and Exchange Act of 1934, 15 USC 78, subsection (aa).

From a judgment in favor of the plaintiff SEC and against the Appellants James V. Armogida, Brigadier General Robert G. Ballance, Fred Beshara, Nathaniel R. Dumont, Joe J. Foss, Stanley E. Henwood, William David Lawry, Elmer M. Luther, Edward H. McLaughlin, Lewis M. Poe, Richard I. Roemer, Charles Soderstrom, John Autry Steel, Clarence L. Summers, Roy L. Williams, Louis Wulfekuhler and Alfred T. Zodda, permanently enjoining the Appellants from certain acts, the Appellants have appealed. The judgment was entered on the 18th day of October, 1961, and these Appellants filed their Notice of Appeal on the 20th day of October, 1961.

This Court has jurisdiction to review the judgment and the findings of fact and conclusions of law under the United States Judicial Code. (65 Stat. 929; 28 USC 1291, and 65 Stat. 727; 28 USC 1294.)

Applicable Statutes, Regulations, Rules and Constitutional Provisions.

The basic statutes, regulations, rules and Constitutional provisions which will become pertinent in this matter are Rule 14(a)9 and Rule 14(a)11; all of Regulation 14 promulgated under the Securities and Exchange Act of 1934 and Fifth Amendment to the United States Constitution. Inasmuch as such statutes, regulations, rules and Constitutional provisions are lengthy they are set down verbatim in the Appendix attached hereto and made a part of this brief.

STATEMENT OF THE CASE.

Preliminary Statement.

Briefly stated, the action which this Court is asked to review centers around a proxy contest in a corporation known as United Industrial Corporation, a Delaware corporation. In this proxy contest the Appellants, known as the Stockholders' Protective Committee, consisted of two small stockholders of United Industrial Corporation, Elmer M. Luther, Jr., and Roy A. Williams, and 15 other members who are known as the "slate" (and who own an aggregate of 25,830 shares). The slate which is running for election to the Board of Directors of United Industrial Corporation (hereinafter referred to as "U.I.C.") consists of James V. Armogida, Canton, Ohio, Director of Perry Rubber Company, and past President of Stark County, Ohio, Bar Association; Brigadier General Robert G. Ballance (retired 1959) United States Marine Corps; Santa Monica, California; Fred Beshara, Youngstown, Ohio, General Director and President of B & B Construction Company; Nathaniel R. Dumont, Beverly Hills, California, President of Dumont Engineering Company and Dumont Aviation Associates; Joe J. Foss, Sioux Falls, South Dakota, Commissioner of the American Football League and former Governor of South Dakota; Stanley E. Henwood, New York, New York, Executive Secretary of the International Poliomyelitis Foundation, and Chairman of the Stockholders' Protective Committee; William David Lawry, Los Angeles, California, President and Director of Tork-Link Corporation; Edward H. McLaughlin, Los Angeles, California, President of Union Hardware and Metal Company; Lewis M. Poe, Colorado Springs, Colorado, Secretary

and General Attorney for Colorado Interstate Gas Company; Richard I. Roemer, Los Angeles, California, attorney, and partner in the firm of Vaughan, Brandlin & Baggot; Charles R. Soderstrom, San Pedro, California, automobile and utilities executive; John Autry Steel, San Francisco, California, insurance executive and owner of Steel & Company, Clarence L. Summers, Los Angeles, California, Public Relations Executive and Management Consultant and President of Pete Summers, Inc.; Louis Wulfekuhler, Los Angeles, California, President and Director of Lockheed Air Terminal, Inc.; and Alfred T. Zodda, New York, New York, Vice-President of Olin Mathieson International Corporation, and Vice-President and Director of Olin Mathieson Chemical Corporation. [Ex. 13; C. T.] It is contesting the present management of U.I.C. for election to the Board of Directors at the annual meeting of the stockholders for 1961.

The Stockholders' Protective Committee had accumulated votes sufficient to constitute a majority of the number of votes likely to be cast at the annual meeting set for July 27, 1961. [R. T. 1292-1293.] The management of U.I.C. and the Appellants were engaged in litigation against each other over mutual claims of false and misleading statements alleged to be in each other's proxy solicitation material, when the Securities and Exchange Commission intervened in the contest. [R. T. 17a-18a.] It filed a separate complaint charging the Stockholders' Protective Committee with making false and misleading statements to the stockholders in their proxy solicitation material. [C. T.] Thereafter the case was tried before the Honorable Thurmond Clarke from time to time between the dates of

July 25, 1961, and September 22, 1961, and resulted in the following:

(a) A finding by the Court that the members of the Stockholders' Protective Committee were individuals of distinction in industry and finance.

(b) A further finding by the Court that in effect these persons of distinction, as members of the Stockholders' Protective Committee, were innocent of any knowledge of, or participation in, making false or misleading statements to the stockholders of United Industrial Corporation.

(c) A judgment of dismissal from the action as to all of the members of the Stockholders' Protective Committee, except the three members who hold the authority to vote the proxies at the meeting.

(d) A simultaneous order in the same judgment against the same DISMISSED defendants invalidating the proxies theretofore obtained by the Stockholders' Protective Committee.

(e) A further order in the same judgment against the same DISMISSED defendants permanently enjoining them from making any solicitation of proxies to the stockholders of United Industrial Corporation, unless the solicitation material shall include certain statements and allegations concerning the Stockholders' Protective Committee which statements and allegations are unsupported by the evidence presented to the trial judge, and are contradictory to some of the Findings of Fact made by the Court. [C. T.]

While Appellants will argue that the dismissal against the Appellants Armogida, Ballance, Beshara, Dumont, Foss, Lawry, Luther, McLaughlin, Soderstrom, Steel,

Summers, Williams, Wulfekuhler, and Zodda makes a nullity of the purported injunction against them, they, nevertheless, have an interest in the appeal from this judgment for the reason that the judgment purportedly invalidates their proxies, and is based upon Findings of Fact and Conclusions of Law, substantial portions of which are not supported by the evidence or are superfluous to the issues, but which if disseminated to the stockholders of U.I.C. without being corrected to conform to the evidence will unjustly impugn the reputations and images these appellants to the extent that they will be unable effectively to solicit new proxies.

Pleadings and Parties.

The complaint in the action below brought before the trial court four separate groups of parties defendant on three separate theories or grounds.

One party defendant is the group making up the Stockholders' Protective Committee, heretofore mentioned, and who are the Appellants herein.

The second party defendant is the U.I.C. Management.

The third party defendant group consisted of Bernard F. Gira, Herbert J. Petersen and Herman Yaras.

The fourth party was Eugene Shafer, doing business as Shafer & Co.

The main thrust of the complaint as it pertains to the Appellants Stockholders' Protective Committee is that the Committee has solicited proxies from the stockholders of U.I.C. by means of false and misleading statements, and, with more particularity, that these false

and misleading statements consisted of omitting to state that Gira, Petersen and Yaras had organized the Committee and its slate of directors, and had solicited proxies on behalf of the Committee; by affirmatively denying that Gira, Petersen and Yaras were members of the Committee.

The theory of the complaint against the defendant United Industrial Corporation management was that they were joined as nominal defendants for the purpose of giving the Court jurisdiction over the adjournment of the annual stockholders' meeting.

The main thrust of the complaint as it applied to the defendants Gira, Petersen and Yaras was that even though they had previously filed a so-called Schedule 14-B pursuant to Regulation 14(a)11 under the Securities Exchange Act of 1934, they should be required to file corrected Schedules 14-B containing additional information and acknowledge that they had participated in the proxy contest.

The main thrust of the complaint against the defendant Shafer, doing business as Shafer & Co., was that Shafer had violated Rule 14(a)11 of Regulation 14 by soliciting proxies (*on behalf of the management of the U.I.C.*) from stockholders of United Industrial Corporation, without first submitting his proxy soliciting material to the Securities and Exchange Commission, and further, without having filed a Schedule 14-B as required by Rule 14(a)11 of Regulation 14.

Since the "participation" of Gira, Petersen and Yaras, if any, as well as the "participation" of Shafer & Co., if any, is not necessarily to be imputed either to the Stockholders' Protective Committee or U.I.C.

management, therefore, in this brief, the Appellants will concern themselves with those areas of the pleadings, evidence and substantive law which relate to the charges made against the Appellants, to-wit: *the solicitation of proxies by false and misleading statements of material facts.*

Statement of Facts.

United Industrial Corporation is a Delaware corporation. The securities of United Industrial Corporation are widely distributed among some 15,000 shareholders. The common and preferred stock of United Industrial Corporation was, until January 16, 1961, listed and registered on the New York Stock Exchange and the Pacific Coast Stock Exchange. United Industrial Corporation commenced operation in January of 1960, as the result of a merger of Topp Industries Corporation, a Delaware corporation, and United Industrial Corporation, a Michigan corporation. The surviving corporation, Topp Industries Corporation, thereafter changed its name to United Industrial Corporation.

Bernard F. Gira and Herbert J. Petersen, who had been the principal officers of Topp Industries Corporation, were elected by the Board of Directors of the merged corporation as President and Executive Vice-President, respectively. They served as members of the Board of Directors during the year 1960.

Late in 1960 it became apparent to the Board of Directors that the assets of United Industrial Corporation would be subjected to certain write downs and adjustments totalling several millions of dollars. The Board of Directors of United Industrial Corporation met on January 12, 13 and 14, 1961 to consider the

handling of the impending write downs which the auditors were having difficulty in estimating due to some alleged improper accounting practices. The closest estimate at this date was in the vicinity of \$6,000,000.00 to \$7,000,000.00. During the course of these meetings it was suggested by other members of the Board of Directors to Gira and Petersen that the necessary report of the impending write downs which was to be made to the various stock exchanges and the Securities and Exchange Commission could be made more favorably if the principal officers, under whose management the problems had developed, were no longer holding that position. In response to this suggestion, Gira and Petersen tendered their resignations as President and Executive Vice-President, which were accepted by the Board of Directors. Thereafter, and at the culmination of the three day meeting, January 14, 1961, they volunteered their resignations as Directors of the corporation.

On about January 16, 1961, the report of the write down was made to the New York Stock Exchange and to the Securities and Exchange Commission. The New York Stock Exchange, Securities and Exchange Commission and the Pacific Coast Stock Exchange immediately suspended trading in the securities of United Industrial Corporation. By this time the market value of the common stock had dropped to an all time low of \$4-7/8. Approximately one year before, in January 1960, the market price had been \$11-7/8. [Ex. 13.]

Several days after the suspension of trading, Gira telephoned Richard I. Roemer, an attorney with the firm of Vaughan, Brandlin & Baggot. [R. T. 214-215.] Gira had become acquainted with Roemer during the

preceding year in which Roemer had done legal work for one of the subsidiaries of United Industrial Corporation, namely, U. S. Science [R. T. 211-212], which had been under the management of the brother of Bernard F. Gira, namely, Robert Gira, before Robert Gira was transferred to a different division. [R. T. 212-213.] Bernard Gira had been sufficiently impressed with Roemer's ability that he had previously offered Roemer a job as general counsel for United Industrial Corporation in October of 1960. Roemer never accepted the offer, however. At Gira's request, Roemer and his partner, J. J. Brandlin, met with Gira at Gira's home approximately a week after the suspension of trading had taken place. [R. T. 214, 1241-1242.]

At this meeting Gira advised Brandlin and Roemer that he and Petersen had a combined investment of close to 100,000 shares of stock in the company, and that this investment represented a major part of their personal assets, and that he was very concerned over the future prospects of their investment. He expressed dissatisfaction with the practices of certain members of the Board of Directors who had assumed apparent leadership of the present management. He expressed the view that the financial future of the corporation was in jeopardy. He also indicated that he had heard rumors that the management might be taking legal action against Petersen and him, and that there was a possibility of an investigation by the Securities and Exchange Commission concerning the suspension of trading.

Gira asked Brandlin and Roemer for suggestions as to his future course. Brandlin and Roemer listened and then suggested several things, including the pos-

sibility of a proxy contest. [R. T. 217.] Gira indicated that he was not interested in engaging in a proxy contest nor in returning to the management of the affairs of U.I.C., he indicated that he was in very poor health, and might have to undergo major surgery in the near future. Brandlin and Roemer then stated that they were in no position to advise him properly on such short notice, and suggested that he come in to their office after they had had time to give the matter more thought. [R. T. 215-217, 1242-1244.]

There followed a meeting in Brandlin's office a couple of days later, with only Gira present, and at this time the three were in accord that both Gira and Petersen should be primarily interested in clearing their names from any stigma resulting from the newspaper articles commenting on their resignations and the recent suspension of trading in stock; that there was nothing to be done about the impending lawsuits except to await their filing and then concentrating their efforts on defending themselves, *but that they should not engage in any proxy contest.* [R. T. 1246-1248.] Gira stated definitely that he and Petersen were not interested in engaging in a proxy contest. Gira had already received calls from stockholders who were dissatisfied and asking for advice, and he then told Brandlin that if the law firm were interested in handling a proxy contest for other stockholders, they would refer any such calls to the law firm. [R. T. 1248-1249, 1372-1375; Ex. 33, pp. 192-193.]

At this time, Brandlin indicated that the firm might be interested in handling a proxy contest for other interested stockholders who might approach him, but indicated that it would be dependent upon whether or not he would be able to organize an outstanding slate

of businessmen who would be definitely independent of any other faction connected with United Industrial Corporation, including Gira and Petersen. Brandlin also indicated that if the firm went into any proxy contest that it would need a stockholders' list, and would probably need the services of a qualified public relations man. Gira indicated that he and/or Petersen had possession of a stockholders' list, and that they would let Brandlin use it. [R. T. 1248-1250.] At this time Gira gave Brandlin the name of Pete Summers as being a public relations man who had previously worked for United Industrial Corporation, and was familiar with its operation. [R. T. 1223, 1254.]

Approximately two days later, on Friday, January 27, 1961, Gira and Petersen came back to the office of Brandlin and Roemer and delivered a stockholders' list to Roemer who indicated that the firm intended to make a duplicate copy of it. Gira and Petersen also told Roemer the names of some of the more substantial stockholders of the company. Then Petersen asked Roemer to transmit the list to the headquarters of United Industrial Corporation when the firm had finished duplicating it. [R. T. 79-81.] Thereafter, on Sunday, the 29th of January, 1961, immediately after the list had been duplicated, Brandlin personally delivered the list to the headquarters of United Industrial Corporation. [R. T. 220-227, 1250-1251.]

During the trial, the Securities and Exchange Commission sought to prove that the stockholders' list had been stolen from United Industrial Corporation's headquarters, either by or at the request of Gira and/or Petersen. Petersen, however, testified that the list had been accidentally included among certain other books,

papers and personal effects which had been transported from his United Industrial Corporation offices, probably on the day he left. [R. T. 69-72.] However, it may have been on another occasion a few days thereafter. [R. T. 194.]

The evidence offered by the Securities and Exchange Commission in support of their contention that the list was stolen was objected to by the Appellants, and the objection was sustained as to all of the Appellants, Stockholders' Protective Committee. [R. T. 54, 58, 162, 164, 189, 192, 200.]

As of the time the law firm had received the stockholders' list they had also received a telephone call from Herman Yaras, then owner of approximately 15,000 shares of United Industrial Corporation [R. T. 1202] (a defendant who was dismissed on judgment of nonsuit). [R. T. 1517.] Yaras indicated that he was interested in seeing new management on the Board of Directors of United Industrial Corporation, and indicated his intention to come to the law firm's offices to discuss the matter. [R. T. 1204.] At approximately the same time the firm received a telephone call from Pete Summers, who had been told by Petersen that the firm might need the services of a public relations man. [R. T. 1222-1223.] Summers indicated he was seeking a possible job handling public relations for any proxy contest which the firm might engage in. During the course of this conversation, Summers indicated to Roemer that he knew Nathaniel Dumont well and thought Dumont, owner of 5,100 shares, might be interested in engaging in a proxy contest, and told Roemer he would make an inquiry of Dumont. [R. T. 2179-2184.] Shortly thereafter, and before the date on

which the stockholders' list was duplicated, Dumont transmitted a telephone message to the law firm, through Summers, to the effect that he was interested in discussing a proxy contest, and wanted an appointment with either Brandlin or Roemer. [R. T. 1594, 2181.] Within a few days after the stockholders' list had been duplicated, Brandlin had already talked in person to Dumont who indicated a willingness to explore a proxy contest, to serve on any committee that was organized, and pledged funds in support of a contest if Brandlin decided to undertake it. [R. T. 1213, 1231.] Brandlin also talked personally to Yaras who encouraged him to take steps to organize a proxy committee, but indicated his personal reluctance to serve on any committee which might be formed. [R. T. 1232.] Within a day or so of his discussion with Dumont, Brandlin sounded out Henwood, a friend and client, whether he might be interested in serving on a slate of directors if the firm went into a proxy contest. [R. T. 1210.] During this same few days, Roemer received telephone calls from stockholders Elmer Luther and Roy Williams, both of whom authorized the law firm to take whatever steps it thought necessary to oppose the management of United Industrial Corporation. [R. T. 229-232, 1315-1318; Exs. 28, J.] Immediately thereafter, Brandlin and Roemer commenced organizing a committee to oppose management which subsequently was called the Stockholders' Protective Committee. [R. T. 232-233.]

The selection of the Stockholders' Protective Committee was made primarily by attorneys Brandlin and Roemer. Brandlin selected Armogida, Beshara, Henwood, Lawry, McLaughlin, Poe, Summers and Wulfe-

kuhler. Roemer selected Foss and Soderstrom, and also received the initial calls from Williams and Luther; and Summers selected Steel and Henwood selected Zoda. [R. T. 234-235, 1340-1341.] Other people were contacted, such as John Roosevelt, son of former President of the United States; Jerome Teggeler, partner of Dempsey, Teggeler & Co.; Gilbert Van Camp, Sr.; Rosalind Tripp; Edward Baruch; W. J. Alford; Jules Schubot, long time stockholders of U.I.C. or its predecessor. For various reasons those people declined to serve. [R. T. 324-328, 1341-1342.]

The original selections where made on a tentative basis with the understanding that each prospective member was to have the opportunity to ratify the entire make up of the slate before making the final acceptance. [R. T. 330.] It was also understood by all members of the slate that the law firm would not have a permanent commitment to go forward unless and until it was satisfied that the slate had a reasonable chance to win the contest. [R. T. 330, 1262, 1340.]

During the course of the organization of the slate, several of the prospective slate members inquired about acquiring shares of stock in the corporation. Roemer contacted Yaras and purchased 2,000 shares from the pledgee of Yaras' stock and, in turn, resold at his cost 1,000 shares among prospective members of the slate. [R. T. 244-246.]

Sometime in late February, 1961, Henwood had a conference with Gira and Petersen together with Brandlin and Roemer and attorney Kendrick, representing Gira and Petersen, at which time Gira and Petersen, at the request of Henwood and Brandlin, outlined the operations of the various subsidiaries of the United

Industrial Corporation so that Henwood and Brandlin would have a better understanding of the corporation. [R. T. 288, 291-295, 1264-1265, 1668-1669.] On another occasion, Brandlin met with Gira, Petersen and their attorney and indicated to them that the Protective Committee intended to send a *telegram* to the management of U.I.C. warning the Management that statements to the effect that the Protective Committee was a "front" for Gira and Petersen were libelous, and Brandlin urged that Gira and Petersen *send a similar telegram*. Brandlin does not know whether Gira and Petersen ever sent such a telegram. [R. T. 1263-1264, 1425-1427.]

The first step in the contest taken by the Committee was to prepare proxy soliciting material. This material was prepared primarily by the attorneys who submitted preliminary drafts to each member of the Committee for their perusal and comment before the draft was submitted on March 13, 1961, to the Securities and Exchange Commission for their clearance. [R. T. 277-278, 302.] Upon the submission of the initial draft, Mr. Sharon Risk, who was in charge of the staff group handling the matter for the Securities and Exchange Commission, indicated that the staff was not in a position to clear the material until they had more information concerning the "genesis" of the Stockholders' Protective Committee. [R. T. 1797-1798.] At this time the SEC Staff indicated that they wanted to take the testimony of various members of the Committee and other persons, both in Washington, D.C., and in Los Angeles. [R. T. 1275-1277, 1799-1800.] The attorneys for the Committee agreed to make the members of the Committee available. [R. T. 1277-1278.]

Thereafter the Securities and Exchange Commission pursuant to an order of Section 21 (a) of the Securities and Exchange Act of 1934 took the testimony of Henwood, Roemer, McLaughlin, Wulfekuhler, Williams, Luther, Dumont, Ballance, Soderstrom, Lawry, Gira, Petersen and Yaras for the stated purpose of "*determining the adequacy and accuracy of the proxy solicitation material of the Stockholders' Protective Committee.*" [R. T. 1166-1169; Exs. 29-39; 42.] These proceedings ran concurrently in Washington, D.C., and Los Angeles and took a period of approximately five days, commencing on the 27th day of March and ending on the 31st day of March, 1961. [R. T. 1279.] After the Securities and Exchange Commission staff had completed the examinations of the various witnesses, and had received other oral and documentary information from the attorneys for the Committee, the staff then consulted with Roemer in Washington, D.C., and outlined what, in their opinion, should be included in the proxy soliciting material. [R. T. 1820-1829.] *This was in line with their stated policy of giving assistance to those who seek their counselling in attempting to comply with the Regulations.* [R. T. 547.] The attorneys for the Committee had not been present at the taking of the testimony of the various witnesses except in the case of Roemer and Henwood [R. T. 1277], and did not have copies of any of the transcripts, but nevertheless redrafted the material in conformity with the suggestions of the staff of the SEC and then resubmitted it. There was then held a final conference between Roemer and various members of the staff of the Securities and Exchange Commission who made additional comments and recommended changes

in certain words and phrases, all of which Roemer complied with. [R. T. 303, 1280-1281, 1829.] The Stockholders' Protective Committee finally received a clearance for the mailing of their first proxy solicitation material on the 6th day of April, 1961. [R. T. 302.] Thereafter, on the 13th day of April, 1961, the proposed second mailing was transmitted to the staff of the SEC and was cleared on the 23rd day of April, 1961. [R. T. 309.] Again in this instance the staff of the Securities and Exchange Commission suggested a considerable portion of the language of the accompanying letter which was used by the Committee. [R. T. 309.] The third prospective mailing was transmitted to SEC on or about the 14th day of May, 1961, and was cleared on the 25th day of May, 1961. [R. T. 310.] There were but a few changes suggested by the SEC for this mailing. The proposed fourth mailing was sent to the SEC on the 3rd day of July, 1961, and on this occasion a staff member of the Securities and Exchange Commission dictated the changes over the telephone to Roemer who took them down on or about July 11, 1961. [R. T. 311, 1983-1984, 2027.] All of the mailings of the Stockholders' Protective Committee appear in Exhibits 13 and A, and some of the passages which became relevant in this case are as follows:

From Mailing No. 1:

"The formation of the Stockholders' Protective Committee started after Richard I. Roemer, a member of the Committee, a nominee for director, and a partner in the law firm representing the Committee, received complaints from stockholders Elmer M. Luther, Jr., a former employee of a subsidiary of the company, and Roy L. Williams, B. F.

Gira's uncle, who own respectively 250 and 400 shares of the common stock of your company. They complained about the decrease in market value of the stock, its suspension from trading, and the apparent internal conflict within the board of directors. These two stockholders requested Mr. Roemer to take whatever steps were necessary to form a new slate of directors and provide your company with new management. This was done by contacting men whom the organizers of the slate considered to be leaders in industry, business and the professions. The selection was made with the qualifications of the individual as the primary consideration and, secondly, his stockholdings in the company. Those men who did not then own stock could not purchase it in the usual manner, since trading had been suspended. As a result, Mr. Roemer purchased 2,000 shares of the company's common stock from Mr. Herman Yaras who in the past had been a financial consultant to the company. Mr. Yaras still owns 10,000 shares of the common stock of the company. Of the shares purchased by Mr. Roemer, 1,000 were sold in 100 share lots to ten members of the slate at no profit. Mr. Roemer retains the remaining 1,000 shares."

"Prior to the foregoing, Mr. Roemer and one of his partners, J. J. Brandlin, conferred with B. F. Gira and H. J. Petersen, the former president and executive vice president, respectively, of the company, concerning Gira's and Petersen's investments in the company. Together, Messrs. Gira and Petersen own in excess of 95,000 shares of the common stock of the company. They stated that

they were not interested in waging a proxy contest, but they did furnish the Committee with information concerning the company including a stockholders list. The law firm of Vaughan, Brandlin & Baggot, in which Messrs. Brandlin and Roemer are partners, does not represent Messrs. Gira and Petersen, nor are Messrs. Gira and Petersen members of the Committee.”

“This Protective Committee, its’ agents and its’ employees, and anyone else directly or indirectly connected with it, have no contracts, arrangements or understandings of any kind whatsoever, direct or indirect, with Messrs. Luther, Williams, Gira and/or Petersen, concerning future employment, financing of this proxy contest, or any other relationship with your company.”

From Mailing No. 3:

“Management, in its recent so-called ‘Interim Report’ and perhaps in ensuing proxy statements, apparently hopes to confuse you by attempting to link this Protective Committee with Mr. Gira and Mr. Petersen. Management has brought a lawsuit to void all of the blue proxies which you have given this Committee. Management claims in this lawsuit (and has claimed in this proxy contest) that we and our slate of directors are the agents of Messrs. Gira and Petersen. Our Proxy Statement, which you received about April 11, 1961, disclosed that Gira and Petersen helped the Committee. In addition, they are the owners of close to 100,000 shares of common stock of U.I.C., and we hope to receive their proxies. As previously stated, they gave us the help indicated

in our Proxy Statement, and we welcomed that help just as we welcome the help and support of *all* stockholders. We appreciate the confidence in our slate of directors expressed by each of you who has sent us a BLUE PROXY."

"Management claims that our slate is a 'front' for Gira and Petersen, so let's look at the facts! Messrs. Wulfekuhler, Armogida, Beshara, and General Ballance know Gira and Petersen primarily as the former president and executive vice president of the company in which they all are substantial stockholders. Armogida and Beshara were formerly large stockholders of Perry Rubber Company, now a valuable subsidiary of U.I.C., and dealt with Gira and Petersen during its acquisition by U.I.C. Mr. Foss met Mr. Gira and Mr. Petersen about two years ago, and they have met two or three times since then on matters not related to this proxy contest. Mr. Henwood met and talked with Gira and Petersen once late in February, 1961, for the purpose of obtaining information about U.I.C. Mr. Dumont owns an interest in some unimproved land in which Mr. Gira, among others, has a 10% interest. Mr. Dumont met Gira and Petersen during World War II when their business interests were in allied fields (not related to U.I.C. or its subsidiaries). They have had various business dealings between 1945 and about 1953, none of which were related to U.I.C. or its subsidiaries, and they have met socially on a few occasions. Our original Proxy Statement discusses the acquaintance of Messrs. Roemer and Summers with Gira and Petersen. The remaining members of the slate, Messrs. Steel, Zodda, Lawry, Soderstrom and

McLaughlin, have never met or communicated in any way with Messrs. Gira and Petersen. We understand Mr. Petersen remembers meeting Mr. McLaughlin during World War II, but Mr. McLaughlin has no recollection of this.”

“The attorneys for the Committee and to a lesser extent, members of the slate of directors themselves, have obtained the participation of fine business and professional men who have agreed to serve as directors of your company. They did not perform these services for Petersen and Gira, or anyone else not named in our soliciting material.”

“We do not feel that it should be necessary to repeat that this Committee and its slate of directors have no obligation, contracts, arrangements, or understandings of any kind whatsoever with Gira, Petersen, any member of the slate, or anyone else. THAT IS THE FACT! Study the records of the members of our slate and we think you will agree that men of their ability and integrity do not ‘front’ for anyone.”

“The only commitment our slate members have made to ANYONE is to use their best ability to restore confidence in U.I.C. and give the company the best management possible with the hope that profit will result to all of the stockholders along with sound growth. WE MAKE THIS COMMITMENT TO EACH AND EVERYONE OF YOU!”

Again From Mailing No. 1:

“None of the aforementioned nominees for director, except as hereinafter stated, has heretofore been a director of the company or has had, or now

has, any material interest, direct or indirect, in any material transaction of the company except as a stockholder. James V. Armogida and Fred A. Beshara have the right to receive additional stock of the company based upon the net pre-tax profits of Perry Rubber Company, a subsidiary of the company, during the next four years, under a contract dated March, 1960. Vaughn, Brandlin & Baggot, of which Richard I. Roemer is a partner, rendered legal services to the company and its subsidiaries during the last 18 months and received fees amounting to \$18,465. Pete Summers, Inc., public relations consultant, of which Clarence L. Summers is president, had an agreement with the company to conduct a products survey over a 90-day period for a fee of \$15,000. It has received \$5,000 to date under this agreement. Mr. Summers, in December, 1960, proposed to the company that he be paid a finder's fee in the event prospective acquisitions which he might locate would be purchased by the company. This proposal was not accepted by the company, and Mr. Summers has received no payments and makes no claims thereunder. Mr. Summers has authorized the Committee to state that he waives all rights he might have, if any, under such proposal. Each of the nominees has advised the Committee that he is not a party to any contracts, arrangements, or understandings with any person with respect to any securities of the company, and that neither he nor any of his associates has any contracts, arrangements, or understanding with any person with respect to any future employment by the

company or any of its affiliates or with respect to any future transaction to which the company or any of its affiliates will or may be a party.”

“Should the Protective Committee be successful in electing a majority of the directors of the company, counsel for the Committee, Vaughan, Brandlin & Baggot, and the Committee’s public relations consultant, Pete Summers, Inc., feel that in the ordinary course of events the board of directors will consider the use of their services in the future as counsel and public relations consultant, respectively. However, no contracts, understandings, commitments, or arrangements, written or oral, express or implied, exist with respect to these matters. There are no contracts, arrangements, or understandings with any person with respect to any future sale, purchase, merger, acquisition, or other transaction of any kind or character with respect to which the company or any of its affiliates are or may be a party.”

From Mailing No. 4:

“WE ARE CRITICAL!

“DEAR FELLOW STOCKHOLDERS:

“For Management to say that this Committee is not critical of Mr. Gira and Mr. Petersen is ridiculous. Mr. Huntington, who signed Management’s proxy material dated June 26th, or whoever wrote that document, apparently chose to ignore the fact that we have consistently criticized the Directors who served during 1960, which includes Gira and Petersen.”

“We are critical of Gira and Petersen and we are equally as critical of Huntington, Fein, Goodman and all the other Directors who served during 1960, and who are now asking for your vote. The Directors running for re-election who served during 1960 and 1961 are FEIN, GOODMAN, HUNTINGTON, HUFTY, MANN, WEIL and BARBER.”

“In our opinion, these men, including Gira and Petersen, and Mr. Huntington, who was Chairman of the Board during 1960 and 1961, and Mr. Fein, who is now Chairman of the Executive Committee, must and will bear the responsibility for the chaotic condition of United Industrial Corporation. The seven Directors now asking for your vote, *led by Fein, Huntington and Goodman*, disavow any responsibility for your company’s problems. They claim their confidence in Gira and Petersen was ‘misplaced’. *We charge that the confidence that the stockholders placed in all of the Directors was misplaced.”*

“LET’S CLEAR THE AIR ON GIRA AND PETERSEN—ONCE AND FOR ALL

“Management’s so-called ‘Interim Report’ of May 15, 1961, again in Huntington’s letter of June 1, 1961, and now in their latest report dated June 26, 1961, charges that this Committee is a ‘front’ for Gira and Petersen. *This is false!* Study our list of nominees and their backgrounds, and *we believe you will agree that men of their caliber do not ‘front’ for anyone.”*

“*WE REPEAT:* We have *no* commitment of any kind to or from Gira or Petersen. They are

not 'motivating' this Committee. A vote on the Blue Proxy will *not* be a vote for 'Gira and Petersen' or anyone else not disclosed to you. Gira and Petersen *are not and cannot* use this Committee as a 'medium' to seize control of the company. We had told you of the assistance we had from Gira and Petersen long before you received the 'Interim Report.' We repeated our position in Report #3 and state it again above. We suppose, however, that *Management* will continue to harp on the subject of Gira and Petersen because they have nothing else to say, and they *must* 'pass the buck.' Certainly there is little they can say that will justify or even explain the results for 1960, except to point at Gira and Petersen and attempt to link this Committee with them. *We don't believe you will be misled by Management's tactics.*"

"These 'results' were 'achieved' during the time that Gira was President, Petersen was Executive Vice President, Huntington was Chairman of the Board, Fein was Chairman of the Executive Committee, and they were all Directors, along with Weil, Mann, Barber, Hufty and Goodman. *ALL OF THESE MEN, EXCEPT GIRA AND PETERSEN, ARE ASKING YOU TO PUT THEM BACK IN OFFICE.*"

"Can Fein, Huntington, Goodman, Barber, Mann, Weil and Hufty disassociate themselves from these 'results' by simply pointing to Gira and Petersen? If, as they indicate, they knew nothing about what really happened during 1960 then certainly they were derelict in their duty and should

be replaced. *Do they claim that all these liquid assets, cash and marketable securities, were spent without their knowledge, or that the bank debt was increased without their knowledge?* This is the implication in their mailing of June 26th. Even assuming that they are correct and that they didn't know anything about these things, *would you want them in office for another year so that more can go on without them knowing about it?"*

On or about April 25, 1961, Management filed a lawsuit in the United States District Court, Western District of New York, in Buffalo, New York, naming the Stockholders' Protective Committee and Gira and Petersen as defendants. The main theme of this complaint, the same as used in their proxy solicitation material, was that the Stockholders' Protective Committee had made false and misleading statements by denying Management's charges that the Stockholders' Protective Committee were acting on behalf of Gira and Petersen and were the agents and representatives of Gira and Petersen. This action was transferred to the Southern District of California in July of 1961, after a motion for change of venue by the defendants. At this time a counterclaim was filed by the Stockholders' Protective Committee charging Management with false and misleading statements in their proxy solicitation material in that they had accused the Committee of "fronting" for Gira and Petersen, and indicating that a vote for the Protective Committee would be "a vote for Gira and Petersen." *A member of the staff of the SEC had repeatedly urged the attorneys for the Committee to file such a counterclaim.* [R. T. 1347-1349.] In this action, known as

U.I.C. v. Henwood, No. 747-61-TC, each side sought similar orders against the other based, primarily, upon identically opposite and mutually exclusive charges.

From the date on which the SEC staff cleared the initial solicitation material of the Stockholders' Protective Committee, the attorneys for the Protective Committee had complied with every request of the SEC.¹ [R. T. 311-312, 1347.] The SHPC had a strong motive to comply with anything the SEC staff requested because there were much ahead in the proxy contest and didn't want any friction to develop with the SEC. [R. T. 1295.] Their conduct was described by the SEC staff member who had charge of the proxy contest up to July 12, 1961, Mr. Sharon Risk, as "co-operative". [R. T. 2016-2017.] On July 11, 1961, when the same member of the staff of the SEC requested the attorneys for the Committee to cause to be filed a Schedule 14-B by Herman Yaras on the ground that the SEC staff had suddenly decided that he had been active as a "participant" on behalf of the Stockholders' Protective Committee, said attorneys indicated that, although they did not represent Mr. Yaras, they would contact his attorney and do what they could to induce him to file a 14-B. [R. T. 285-286.] Thereafter, they immediately contacted Yaras and his attorney and persuaded him to file a 14-B. Four business days later, on Monday, July 17, 1961, the at-

¹Excepting one instance in which the attorneys had accidentally omitted to make a change in a piece of literature. This was in reference to Bernard Fein being described as the "Chairman of the Executive Committee" as of a certain date instead of describing him as a "Member." The SEC staff member called this error to the attention of Roemer, who corrected it in several places in the literature, but inadvertently failed to correct it in one place. [R. T. 311.]

torneys for the Committee telephoned the SEC in Washington, D. C., and advised them that Mr. Yaras' 14-B was in the mail, but on the next day, July 18, 1961, the staff of the SEC recommended to the Committee that the action against the Protective Committee be brought. [R. T. 903-907.] (The trial court in the case at bar subsequently dismissed the case as to Mr. Yaras and held that Mr. Yaras was *not* a "participant," and therefore was not required to file Schedule 14-B.) [C. T.]

On or about July 12, 1961, Gira and Petersen filed a libel action against the members of the Board of Directors of U.I.C [Ex. KK] charging them with making derogatory statements in their proxy material about Gira and Petersen's "ability and integrity." [R. T. 1950.] At this time, their attorney, Kendrick, submitted a proposed press release concerning the filing of the lawsuit to the SEC staff for their opinion as to whether such a press release would constitute a proxy solicitation. The SEC staff advised the attorney that the press release would constitute a proxy solicitation and requested that Gira and Petersen file a Schedule 14-B. [R. T. 1977-1978.] At this time, the attorney for Gira and Petersen stated that he would withdraw the press release and not issue it. [R. T. 474-475.] As it turned out, the press agent, without authorization, went ahead and issued the press release. [R. T. 630-631.] The form in which it was published in the papers was not the same as the press release and turned out to be only a statement of the fact of the filing of the lawsuit. [R. T. 1950, 486-488; Exs. AA, BB, CC, DD.] *No member of the Stockholders' Protective Committee, nor its attorneys had anything to do*

with the filing of this lawsuit or in the issuance of the press release. [R. T. 296.]

The decision to recommend the filing of the SEC action against the Stockholders' Protective Committee was made by members of the staff who, until July 12th, had only been assisting Mr. Risk, and were not as familiar with the handling of proxy contests as was Mr. Risk. [R. T. 2081, 2084-2085.] One of them, Gordon, had never handled a contest before. The discussion among the staff members leading up to the decision to recommend the filing of a lawsuit commenced after July 11, 1961. [R. T. 1855, 2087-2088], when an attorney for Management was in the offices of the SEC and urged several of the members of the staff, namely, Gordon, Weinman and Risk [R. T. 875-877] to bring an action against the Stockholders' Protective Committee based on the alleged participation of Yaras, "*at the last minute in order to void their proxies.*" [R. T. 877-878.] This same attorney for Management telephoned the SEC staff concerning the same subject matter on July 11, 1961 [R. T. 784-786], and, on the following day, after Mr. Risk, the staff member who had been in charge of the proxy contest, and who was the one most familiar with the volumes of transcript and other information which the SEC had collected throughout the proxy contest, had left on his vacation [R. T. 732], the other members of the staff began "thinking and talking" about the filing of the lawsuit. [R. T. 733-736.] There was no mention of a lawsuit while Risk was on duty. [R. T. 1855.]

Trial.

The case of U.I.C. v. Henwood, No. 747-61 TC, had commenced trial before the same trial judge on July 17, 1961; however, on the second day of trial, the Court announced from the bench that he had received a long distance telephone call from a Mr. Kennamer, the Chief Enforcement Officer of the Securities and Exchange Commission, who had advised him that the SEC was about to intervene in some manner in the lawsuit. [R. T. 17a.] The trial of the action of U.I.C. v. Henwood was then continued to July 25, 1961. Thereafter, and on July 25, 1961, the Court suspended the trial of the action of U.I.C. v. Henwood and granted a priority to the action which had been filed by the SEC on July 21, 1961, as an independent action. [R. T. 23a.] This action, while embodying generally similar claims as those made by management in U.I.C. v. Henwood, does not include the opposite side of the issue which was presented by the Stockholders' Protective Committee counterclaim in U.I.C. v. Henwood.

On the day that the SEC v. Henwood case was called for trial, the SEC asked the trial court to grant an immediate temporary restraining order against the Appellants [R. T. 26a] restraining them from soliciting proxies by means of alleged false or misleading statements with respect to the Committee's relationship to Gira and Petersen, and from voting proxies already obtained by them pending the hearing of the action on the preliminary injunction. This restraining order also included recitals to the effect that the Appellants had previously solicited proxies by means of false and misleading statements concerning the Appellants' relation-

ship with Gira and Petersen. [C. T.] The affidavits filed in support of the application for a restraining order did not contain any allegation whatsoever concerning any act or threatened act of the Appellants with respect to the solicitation of proxies by false and misleading statements which in any way concerned Gira or Petersen or Yaras. [C. T.] This was pointed out to the Court during the proceedings on the first day of trial. [R. T. 34a-35a.] The court stated from the bench that he had had Mr. Kennamer, the SEC's Chief Enforcement attorney before him in another case for two years [R. T. 36a], and that the Court and Mr. Kennamer had been arrayed against approximately "eight attorneys" but that "*we* were affirmed on appeal and certiorari was denied, and *we* saved some people millions of dollars, and if they had paid attention to *us* two years ago, *we* would have saved them more money." [R. T. 77a, 116a-117a.] The Court further indicated that he could see no need for Appellants to resist the temporary restraining order because "Mr. Kennamer isn't going to hurt anybody with his temporary restraining order." [R. T. 76a.] The following day after considerable discussion, the Court signed the temporary restraining order over the objection of counsel for Appellants and made findings of fact, all without foundation in the affidavits submitted by the SEC, and then ordered the immediate hearing of the preliminary injunction [R. T. 131a], even though counsel for Appellants had had no opportunity to prepare for the

hearing and was actually engaged in a trial in another case in the Superior Court of the County of Los Angeles. [R. T. 128a-130a.]

On this occasion the Court again indicated that it had the “greatest respect and admiration for Mr. Kennamer” [R. T. 116a-117a] and was “mad” at Mr. Robinson. [R. T. 119a.] During the latter stages of the trial, the Court openly admitted that he felt that he had been “championing” the rights of Mr. Kennamer and the SEC in this case. [R. T. 1180.] The Court in its Memorandum opinion signed October 3, 1961, also embodied the suggestions and exact phraseology suggested by Mr. Kennamer in his argument. [R. T. 2213, 2214.]

The Court also signed the exact Findings of Fact and Conclusions of Law and Judgment as drafted by Mr. Kennamer without changing a single word, and this was after a full hearing in open court at which time the counsel for the Appellants and the counsel for Gira and Petersen pointed out to the Court various and obvious errors in the proposed Findings of Fact and Conclusions of Law and Judgment. [R. T. 2289-2347; C. T.]

On this same occasion, the Court described the appellants, as a group, as the “worst people” that the Court had ever had in its courtroom [R. T. 2311], although in the Memorandum Opinion and the Findings of Fact the Court had indicated that these same appellants were outstanding and men of distinction.

During the trial, the Securities and Exchange Commission produced as witnesses on behalf of the SEC certain members of the staff who were not completely familiar with all of the information accumulated by the Securities and Exchange Commission during the proxy contest. The Appellants requested and received definite assurances in open court from the attorney representing the Securities and Exchange Commission that the member of the staff who had been in charge of the case from the beginning and who had the most knowledge of circumstances and information accumulated by the SEC, Mr. Risk, would also be produced. [R. T. 25-26.] However, as the trial continued week after week the attorney for the Securities and Exchange Commission kept postponing the production of the witness [R. T. 861, 865-872] and finally refused to produce the witness. At this time, the Court refused to grant the request of Appellants' counsel to order the production of the witness on the stated ground that the Court was powerless to make such an order. [R. T. 1128-1132, 1336.] Finally, the Appellants gave notice of taking of the witness' deposition in Washington and the attorney for the Appellants traveled to Washington, D. C., to take the deposition of the witness Risk and the witness Cohen. [R. T. 1400, Ex. 50, Ex. N.] In each of these depositions, the witnesses refused to answer certain questions which the Court had already ruled were proper and which the Court subsequently ruled as being proper. The Court refused to grant any

sanctions against the Securities and Exchange Commission for this refusal. [R. T. 1601-1663.]

Judgment.

As previously stated, the judgment enjoins the Appellants, and each and all of them, from voting any proxy of any stockholder now held by the Stockholders' Protective Committee, or from voting any proxy which is not received pursuant to a future solicitation of proxies in accordance with the Rules and Regulations of the Securities and Exchange Act of 1934, and further enjoins the Appellants, and each and all of them, from soliciting any future proxies unless they include in their proxy solicitation material statements which were not supported by the evidence, and, among other things, include the statement to the effect that defendants, Gira and Petersen, are "members" of the Stockholders' Protective Committee which will, in the light of the circumstances surrounding the contest, imply that the Stockholders' Protective Committee is acting in this proxy contest on behalf of Gira and Petersen. At the same time that it enjoins them and invalidates their proxies, the judgment dismisses from the action the Appellants James V. Armogida, Brigadier General Robert G. Ballance, Fred Beshara, Nathaniel R. Dumont, Joe J. Foss, William David Lawry, Elmer Luther, Edward H. McLaughlin, Charles Soderstrom, John Austry Steel, Clarence L. Summers, Roy Williams, Louis Wulfekuhler, and Alfred T. Zodda. [C. T.]

Questions Presented on Appeal.

1. DID NOT THE TRIAL COURT ERR IN PURPORTING TO ENJOIN CERTAIN OF THE APPELLANTS WHILE AT THE SAME TIME DISMISSING SAID APPELLANTS "WITHOUT PREJUDICE," AFTER A TRIAL ON THE MERITS?

2. DID NOT THE COURT ERR IN HIS JUDGMENT BY PURPORTING TO IMPOSE AN INJUNCTION AGAINST ALL OF THE APPELLANTS WHICH WAS NOT SUPPORTED BY THE COURT'S OWN FINDINGS OF FACT AND CONCLUSIONS OF LAW?

3. WAS NOT THE EVIDENCE LEGALLY INSUFFICIENT TO SUSTAIN THE JUDGMENT IN THAT THERE WAS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THE ESSENTIAL DETERMINATION THAT APPELLANTS HAVE MADE FALSE AND MISLEADING STATEMENTS OF MATERIAL FACTS, OR OMITTED TO STATE MATERIAL FACTS NECESSARY TO MAKE THEIR SOLICITATION STATEMENTS NOT FALSE OR MISLEADING?

This question was raised by appellants' motion for a judgment of dismissal under Rule 41-B, which was denied by the Court.

4. DID NOT THE COURT DENY THE APPELLANTS DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE MANNER IN WHICH IT APPLIED REG-

ULATION 14 OF THE SECURITIES AND EXCHANGE ACT OF 1934 TO THE FACTS IN THIS CASE?

5. DID THE APPELLEE SEC SHOW ITSELF TO BE ENTITLED TO THE EQUITABLE REMEDY OF AN INJUNCTION AGAINST THE APPELLANTS AND AN ORDER INVALIDATING APPELLANTS' PROXIES IN ANY EVENT?

6. DID NOT THE TRIAL COURT DENY THE APPELLANTS A FAIR TRIAL BY FAILING TO EXERCISE GENUINE JUDICIAL DISCRETION AND JUDGMENT?

Specification of Errors.

I. The Court erred by purporting to impose an injunction against the appellants Armogida, Ballance, Beshara, Dumont, Foss, Lawry, Luther, McLaughlin, Soderstorm, Steel, Summers, Williams, Wulfekuhler and Zodda at the same time that the Judgment dismissed said appellants from the action. That portion which purports to grant an injunction against said appellants is void.

II. That portion of the Judgment which purports to impose an injunction against all the appellants soliciting further proxies unless under certain specified conditions* is not supported by the Court's own Findings of Fact and Conclusions of Law.

III. The trial court erred in not granting appellants' motion to dismiss the action as to all of the appellants

*For a complete statement of that portion of the injunction, see Appendix A.

and to enter Judgment in favor of all of the appellants on the grounds that upon the facts adduced and the law of the case, plaintiff was not entitled to relief; such dismissal should have been “with prejudice.”

IV. The Court erred by making an unconstitutional application of Regulation 14 of the Securities and Exchange Act of 1934 to the facts of this case and appellants were thereby denied due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States.

V. The Court erred by making certain Findings of Fact which are clearly erroneous and/or immaterial and inappropriate to the Judgment and/or are argumentative.

- A. A portion of Finding No. 5 is clearly erroneous.*
- B. A portion of Finding No. 6 is clearly erroneous.*
- C. A portion of Finding No. 7 is clearly erroneous.*
- D. A portion of Finding No. 9 is immaterial and inappropriate to the Judgment.*
- E. A portion of Finding No. 11 is clearly erroneous.*
- F. A portion of Finding No. 12 is clearly erroneous and is also argumentative.*
- G. A portion of Finding No. 13 is clearly erroneous.*
- H. A portion of Finding No. 14 is clearly erroneous.*

*The exact language of each Finding which is herein challenged is stated verbatim in the argument section of this brief, *infra*.

I. A portion of Finding No. 15 is clearly erroneous.*

J. A portion of Finding No. 17 is clearly erroneous and argumentative.*

K. A portion of Finding No. 19 is clearly erroneous.*

L. A portion of Finding No. 20 is argumentative.*

M. A portion of Finding No. 21 is clearly erroneous.*

N. A portion of Finding No. 22 is clearly erroneous.*

O. Finding No. 23 is immaterial.*

P. A portion of Finding No. 24 is clearly erroneous.*

VI. The Court erred by not denying the Appellee (SEC) the equitable remedy of an invalidation of appellants' proxies and of an injunction against appellants for the reason that Appellee (SEC) had denied appellants due process as guaranteed by the Fifth Amendment to the United States Constitution by the manner in which Appellee had administered the Securities and Exchange Commission Regulation of 1934 in this case.

VII. The Court erred by denying the appellants a fair trial as guaranteed by the due process clause of the Fifth Amendment in that the Court failed to exercise genuine judicial discretion and judgment.

*The exact language of each Finding which is herein challenged is stated verbatim in the argument section of this brief, *infra*.

I.

The Court Erred by Purporting to Impose an Injunction Against the Appellants Armogida, Ballance, Beshara, Dumont, Foss, Lawry, Luther, McLaughlin, Soderstrom, Steel, Summers, Williams, Wulfekuhler and Zodda at the Same Time That the Judgment Dismissed Said Appellants From the Action. That Portion Which Purports to Grant an Injunction Against Said Appellants Is Void.

That portion of the judgment which purporrts to enjoin the appellants Armogida, Ballance, Beshara, Dumont, Foss, Lawry, Luther, McLaughlin, Soderstrom, Steel, Summers, Williams, Wulfekuhler and Zodda, as members of the Stockholders' Protective Committee, from soliciting proxies except under certain conditions* [C. T.] is void for the reason that the same judgment dismisses said appellants from the case.

It is a well recognized rule of law in all jurisdictions that a court must have jurisdiction over the person in order to enjoin him from doing or to command him to do certain acts. *Booth v. Clarke*, 58 U. S. 322, 333; *Clarke v. Boysen*, 39 F. 2d at 815; *Hatahley v. United States*, 351 U. S. 173 at 183.

*"It is ordered, adjudged and decreed that the defendants United Industrial Corporation, Stockholders' Protective Committee, Stanley E. Henwood, Richard I. Roemer and Louis M. Poe, individually and as members of and proxies of said Stockholders' Protective Committee, *all members, associates, substitutes, agents, employees and attorneys of said Stockholders' Protective Committee . . .*" [C. T.].

When a court of equity renders a decision against a defendant, and enjoins him from certain acts, it impliedly retains jurisdiction over said person for the purpose of carrying out its decree; BUT WHEN A COURT DISMISSES A PARTY FROM AN ACTION, IT LOSES ALL JURISDICTION OVER THAT PARTY, IT IS AS THOUGH THE ACTION HAD NEVER BEEN BROUGHT. THE DISMISSAL CARRIES DOWN WITH IT EVERY PREVIOUS ORDER MADE THEREIN. *Bryan v. Smith*, 174 F. 2d 212; *A. B. Dick Co. v. Marr*, 197 F. 2d 498; *Trowbridge v. Love*, 50 Cal. App. 2d 746. A proceeding is nonetheless terminated because it is dismissed “without prejudice,” and the Court is nonetheless without further jurisdiction. *Mitchell v. Bd. of Governors of Washington*, 145 F. 2d 827, where a cause has been regularly tried on its merits a dismissal of the defendant is *with prejudice* regardless of the fact that the judgment may say “without prejudice”. *United States v. Bd. of Comm. of Grady County*, 54 F. 2d 593, 596.

Based upon the evidence that was before the Court, the Court properly entered a judgment of dismissal as to the appellants Armogida, Ballance, Beshara, Dumont, Foss, Lawry, Luther, McLaughlin, Soderstrom, Steel, Summers, Williams, Wulfekuhler and Zodda, and once having done so, lost all jurisdiction over them, and any attempt to enjoin them in the same judgment is a nullity.

II.

That Portion of the Judgment Which Purports to Impose an Injunction Against All the Appellants Soliciting Further Proxies Unless Under Certain Specified Conditions Is Not Supported by the Court's Own Findings of Fact and Conclusions of Law.

That portion of the judgment which, in effect, purports to impose an injunction against all of the appellants from soliciting proxies in the future by means of any proxy statement or other communication, written or oral, which omits to state:

1. That Bernard F. Gira and Herbert J. Petersen were "*instrumental in initiating and organizing the Stockholders' Protective Committee and in formulating on behalf of said Committee a slate of directors*";

2. That "Bernard F. Gira and Herbert J. Petersen have *participated* with representatives of the Stockholders' Protective Committee and *aided and abetted* said Committee and its representatives in conducting proxy solicitation";

3. That "Bernard F. Gira and Herbert J. Petersen are members of the Stockholders' Protective Committee";

4. That "Bernard F. Gira and Herbert J. Petersen are *participating* with Stockholders' Protective Committee in soliciting proxies"

IS WHOLLY UNSUPPORTED BY THE FINDINGS OF FACT AND CONCLUSIONS OF LAW, FOR THE REASON THAT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW MENTION ONLY TWO PARTICULARS WHEREIN APPEL-

LANTS ARE ALLEGED TO HAVE MADE FALSE AND MISLEADING STATEMENTS IN THEIR PREVIOUS PROXY SOLICITING MATERIAL.

The first such Finding occurs in the last sentence in Finding No. 14 (App. B) which states as follows:

“The assertion in the Committee’s proxy statement that counsel for the Committee started the organization of the Committee on behalf of Luther and Williams is seriously misleading.”

The second such Finding is in the sentence of Finding No. 23 (App. B):

“The Committee’s proxy material also was misleading in stating that certain losses sustained by UIC and diminution of stockholders’ equity occurred when Bernard F. Fein was Chairman of the Executive Committee of UIC.”

In neither of these particulars is there any reference to Gira or Petersen. THERE ARE NO OTHER FINDINGS WHICH PURPORT TO “FIND” THAT THE LITERATURE OF THE STOCKHOLDERS’ PROTECTIVE COMMITTEE WAS FALSE AND MISLEADING IN ANY PARTICULAR.

Therefore, such portion of the injunction as has been enumerated in 1, 2, 3 and 4 above is wholly gratuitous and outside the scope of any of the Findings of Fact and Conclusions of Law.

III.

The Trial Court Erred in Not Granting Appellants' Motion to Dismiss the Action as to All of the Appellants and to Enter Judgment in Favor of All of the Appellants on the Grounds That Upon the Facts Adduced and the Law of the Case, Plaintiff Was Not Entitled to Relief; Such Dismissal Should Have Been "With Prejudice."

While the judgment of dismissal as to the appellants Armogida, Ballance, Beshara, Dumont, Foss, Lawry, Luther, McLaughlin, Soderstrom, Steel, Summers, Williams, Wulfekuhler and Zodda does not specify the grounds upon which it is entered, it is apparent that it is on the ground that under the evidence and the law the plaintiff failed to sustain its burden of proof as to the appellants so dismissed. Although the Court purported to enter the dismissal "without prejudice" it would appear that a dismissal after a full trial on the merits is "with prejudice", and the characterization of the dismissal as "without prejudice" does not change the legal effect. (*Mitchell v. Bd. of Governors of Washington*, 148 F. 2d 827.)

As indicated in the Court's Memorandum Opinion, which was incorporated by reference as part of the Findings of Fact and Conclusions of Law, ALL of the members of the Stockholders' Protective Committee were found to be men of "distinction" who had been "shielded" from any knowledge of any of the material facts which it is alleged were omitted from the proxy soliciting material of the Committee. There is no distinction made in the Findings of Fact or Conclusions of Law or the Memorandum Opinion of the Court be-

tween any members of the Stockholders' Protective Committee, including Henwood, Poe and Roemer, except that Henwood, Poe and Roemer are the persons who had the authority and power to vote the proxies which had been solicited on behalf of the Committee. Therefore, in order to invalidate the proxies of the Committee, it was necessary to enjoin those three appellants from using their power and authority to vote the proxies. However, if the other members of the Stockholders' Protective Committee were entitled to a Judgment of Dismissal on the merits, THERE IS NO LOGICAL BASIS WHY THE APPELLANTS HENWOOD, POE AND ROEMER WERE NOT ALSO ENTITLED TO THE SAME JUDGMENT.

ALL THE MATERIAL FACTS HAVE BEEN
TOLD TO THE STOCKHOLDERS.

Over and above the technical grounds asserted above, there remains the basic point made on this appeal, and that is that the evidence failed to show that any of the appellants individually or as members of the Stockholders' Protective Committee had violated the Securities and Exchange Act of 1934, and particularly Rule 14(a)9 promulgated thereunder.

In plaintiff's Complaint each of the appellants, without distinction, is charged with soliciting proxies by means of proxy soliciting material which contained false and misleading statements as to material facts in violation of Rule 14(a)9. The pertinent language of Rule 14(a)9 is as follows:

“Communications, written or oral, containing any statement which, at the time and in the light of the circumstances . . . is false or mislead-

ing with respect to any *material fact* or which omits . . . any *material fact* necessary to make statements . . . not false or misleading or . . . to correct any statement in any earlier communication . . .”* (Emphasis added.)

As specified in the Complaint, the alleged false and misleading statements of MATERIAL FACTS were divided into three distinct subject matters: (a) statements, or omissions to state, concerning the Stockholders’ Protective Committee’s relationship with Gira and/or Petersen and/or Yaras; (b) an alleged statement concerning Luther and Williams and the formation of the Committee; and (c) a statement concerning the corporate office held by Bernard Fein as of a particular time.

(a) Regarding Gira, Petersen and Yaras.

With respect to the first category, that is, the relationship, if any, among the Stockholders’ Protective Committee and Gira and Petersen and Yaras, it is the appellants’ position that AN EXAMINATION OF THE WRITTEN SOLICITING MATERIAL SENT TO THE STOCKHOLDERS MANIFESTLY SHOWS THAT ALL OF THE MATERIAL FACTS SURROUNDING THE RELATIONSHIP OF THE STOCKHOLDERS’ PROTECTIVE COMMITTEE WITH GIRA AND PETERSEN AND YARAS HAVE BEEN STATED. [Exs. 13, A.]

First of all, it should be borne in mind that the material facts in this case are basically undisputed. There-

*See Appendix A for complete language of rule.

fore, this Appellate Court is in as good a position as was the trial court to make a judgment as to whether or not the proxy soliciting material was false and misleading in the light of the circumstances surrounding the particular proxy contest.

In order to make a valid judgment as to whether or not proxy soliciting material is false and misleading, as defined in Rule 14(a)9, it is necessary to know the standard by which one is measuring. In order to know the standard, it is necessary to define one's terms. The words "MATERIAL FACTS" in the regulation does not mean every minute detail which could have been stated, nor does it mean every possible fact that relates to a subject matter (*Shvets v. Industrial Rayon Corporation*, D. C. South. Dist. of New York (1960), C. C. H. Fed. Securities Law Rep. par. 90958). Simple basic economics would preclude the stating of a biography of every person who is in some way connected with a proxy contest. The Securities and Exchange Commission itself and the courts have held that "material facts" are those facts which *in the light of the particular circumstances* can reasonably be calculated to influence the votes of the stockholders in general. Such facts should be included in the proxy soliciting material and should be stated fairly (*Phillips v. United Corp*, C. C. H. Fed. Securities Law Rep. par. 90395 (1947)).

Assuming the foregoing to be the proper standard, the next question is to determine what were the pertinent "circumstances" which were casting the light within which the material facts are to be judged.

In this particular proxy contest the stockholders of United Industrial Corporation were primarily interested

in reversing the poor financial condition to which the corporation had dropped during the previous year and in reversing the trend of the market value of their securities. There was considerable indication that the poor condition which the corporation found itself in had been the result of mismanagement. The incumbent board of directors was disclaiming responsibility for the condition and, as their excuse, were pointing their fingers at Messrs. Gira and Petersen who had recently resigned as president and vice president [Ex. 14]. The incumbent board had accused the Stockholders' Protective Committee of "fronting" for, and acting on behalf of, Messrs. Gira and Petersen, and had even stated that a vote for the Protective Committee would, in effect, be a vote for Gira and Petersen. [Ex. 14.] The obvious implication of these charges was that Gira and Petersen were attempting to be restored to a position in management through the vehicle of the Protective Committee, or at the very least, had some other significant arrangement or understanding with the Committee.

In the foregoing "light" the MOST material fact which could be calculated to influence the vote of the general stockholders of United Industrial Corporation was the fact of whether or not any arrangements or understandings existed between a member or members of the Protective Committee and Gira and Petersen which would benefit the latter pair.

With respect to that material fact, the Protective Committee stated categorically in its literature that there was "no obligation, contract, arrangement or understanding of any kind whatsoever with Gira, Petersen or anyone else." [Exs. 13, A.] Such a statement could certainly be calculated to influence the vote of

many stockholders. If this statement were untrue, there is absolutely no doubt that the soliciting material is false and misleading. Throughout the case, however, there was no evidence of any kind to disprove this statement, and, indeed, nowhere in the Findings of Fact and Conclusions of Law or in the Judgment is there any statement of fact which contradicts this statement. In fact, the Court states in its Memorandum Opinion which is incorporated into the Findings of Fact and Conclusions of Law that the members of the Protective Committee are persons of distinction.

In addition to this most material fact, the literature of the Stockholders' Protective Committee went further and stated a whole spectrum of facts, ranging from much less material than the MOST material fact down to miscellaneous data of a basically immaterial nature. Thus the stockholders were told:

1. That Gira and Petersen had conferred with counsel for the Protective Committee prior to the time that counsel for the Protective Committee had undertaken the proxy contest;
2. That Gira and Petersen had discussed the subject of a proxy contest with the law firm, but had indicated that they personally did not want to be involved;
3. That Gira and Petersen had helped the attorneys for the Committee and the Committee itself by providing a stockholders' list;
4. That Gira and Petersen had given information to the attorneys for the Committee;
5. That Gira and Petersen had had a conference with the Chairman of the Stockholders' Protective Committee and had supplied him with information regarding the corporation;

6. That Gira was the nephew of Roy Williams; that Gira and Petersen knew Wulfekuhler, Armogida, Beshara and General Ballance as a result of their former position with the corporation; that Mr. Foss knew Gira and Petersen; that Dumont owned an interest in some unimproved land in which Gira had an interest and that they had known each other through business dealings and socially since 1945, and that Roemer and Summers knew Gira and Petersen; and

7. That the Stockholders' Protective Committee welcomed the help that they had received from Gira and Petersen and hoped and expected to get their votes. [Exs. 13, A.]

WHAT OTHER FACTS COULD HAVE BEEN STATED TO THE STOCKHOLDERS WHICH COULD REASONABLY BE CALCULATED TO INFLUENCE THE VOTES OF THE STOCKHOLDERS? WHEREIN HAVE THE STOCKHOLDERS BEEN MISLEAD BY THE FACTS AS STATED?

The Court in its Judgment answers these questions by stating in effect that the Stockholders' Protective Committee should have stated "that Bernard F. Gira and Herbert J. Petersen were *instrumental* in *initiating* and *organizing* the Stockholders' Protective Committee and in *formulating* * * * a slate of directors," but this is not a statement of FACT. These are mere conclusions and characterizations which are purportedly taken from the facts previously stated. The Judgment says that the Stockholders' Protective Committee should have stated that Gira and Petersen "*aided and abetted* said Committee." The phrase "aided and abetted" is practically synonymous with the word

“help.” The literature of the Stockholders’ Protective Committee literally states that Gira and Petersen “helped” the Committee. [Ex. 13.] The Judgment further states that the Stockholders’ Protective Committee should have stated that Gira and Petersen are “members” of the Stockholders’ Protective Committee and that they “participated” with the Stockholders’ Protective Committee. However, even the Conclusions of Law of the Court state that Gira and Petersen are not members in a “formal sense”, but that their membership is concluded “from their *de facto* participation.” [C. T.; Appendix B.] Here again we do not have a statement of fact, but a conclusion from the facts which have been told to the stockholders.

This conclusion is also an erroneous conclusion because it (a) makes “participation” as defined in the Regulations equivalent to “membership”, and (b) applies an erroneous definition of “participation” as defined by the Rules.

Rule 14(a)11, subsection (b)3 defines a *de facto* unnamed “participant in a solicitation” as “any person * * * who * * * takes the initiative in organizing, directing or financing * * *.” The phrase “takes the initiative” in common parlance refers to “the power of overcoming one’s own inertia, of originating something, and having the self-reliance or energy required to take the first step in making new undertakings.” Reduced to simplicity it obviously refers to that person, or persons, who assume the promotional responsibility for “organizing, directing or financing” a committee or group. While the appellants have always admitted that Gira and Petersen have helped the Stockholders’ Protective Committee in several ways,

the evidence is clear and convincing that neither Gira nor Petersen took the leadership, promotional responsibility, first step, or any act [*ergo* “*initiative*”] to organize, direct or finance the Stockholders’ Protective Committee. (This was obviously Brandlin and Roemer.) Therefore, Gira and Petersen are not participants as defined in Rule 14(a)11, subsection (b)3.*

Rule 14(a)11, subsection (b)3 read in its entirety clearly distinguishes the phrase “participant in a solicitation” from a “member” of a committee. While a member of a committee may also be a “participant” one may be or become a “participant in a solicitation” in many ways other than membership on a soliciting committee. A person who even though not named as a member of a committee takes the initiative in organizing, directing or financing such committee becomes a “participant”.

There s nothing in the Rules or Regulations that make such “participation” the equivalent of “membership.”

THE CONCLUSIONS AND CHARACTERIZATIONS REQUIRED TO BE MADE IN APPELLANTS’ MATERIAL BY THE COURT’S JUDGMENT AGAINST THESE APPELLANTS ARE NOT FACTS AND ARE NOT REQUIRED TO BE STATED ACCORDING TO THE LANGUAGE OF RULE 14(a)9.

To show the difficulty of adhering to a standard which requires the statement of CONCLUSIONS rather than FACTS, it should be pointed out that during the same trial the substantial evidence showed that Herman Yaras [R. T. 959-1014.]

*For complete text of Rule 14(a)11, Appendix A.

1. Contacted the attorneys for the Stockholders' Protective Committee before the attorneys undertook to handle the proxy contest;

2. Had not only discussed the proxy contest with them, but urged the attorneys for the Committee to go forward and to organize a slate of directors to oppose management;

3. Personally was interested in seeing a new management formed, although he did not personally wish to be involved in the proxy contest;

4. Referred one of the initial members of the Committee to the attorneys; (Luther.)

5. Had additional contact with the attorneys for the Committee during the proxy contest, and in so doing, sold shares of stock to Roemer, which was later disseminated to the members of the Stockholders' Protective Committee;

6. Had given his personal proxy for approximately 10,000 votes to the Stockholders' Protective Committee.

However, the Court at the end of plaintiff's case dismissed Yaras under Rule 41-B and held in the separate Findings of Fact and Conclusions of Law [C. T.] that he had not "aided and abetted" the Committee; that he had not been "instrumental in initiating or organizing" the Committee or in "formulating" on behalf of said Committee a slate of directors, nor had he "participated" with the Stockholders' Protective Committee or its representatives, nor had he "aided or abetted" said Committee or its representatives in conducting proxy solicitations.

The only reference to Yaras in the proxy soliciting material of the Committee is the statement that he was

a former “financial consultant to the company” and that he sold 2000 shares of stock to Roemer, who disseminated it to the Committee. [Ex. 13.] Yet, the net effect of the Court’s Judgment in favor of Yaras and the Findings of Fact and Conclusions of Law applicable thereto [C. T.] IS A JUDGMENT IN FAVOR OF THE APPELLANTS AS TO THE ALLEGATIONS OF THE COMPLAINT WHICH CLAIM THAT THE COMMITTEE MISSTATED OR OMITTED MATERIAL FACTS CONCERNING YARAS’ RELATIONSHIP WITH THE COMMITTEE!

By the same standards as were used by the Court in judging the appellants’ material as it pertained to Yaras, the appellants were entitled to a Judgment of Dismissal on the merits as to all of the allegations of plaintiff’s Complaint.

(b) Regarding Williams and Luther.

With respect to the allegations in the Judgment concerning the Committee’s statements regarding Williams and Luther above mentioned, this will be dealt with extensively in the portion of our Brief devoted to an attack upon the Findings of Fact and Conclusions of Law. However, suffice it to say that there is no evidence in the case that the Stockholders’ Protective Committee ever stated that the formation of the Stockholders’ Protective Committee was initiated “*solely* as the result of complaints of * * * Luther and * * * Williams.” [Ex. 13.]

(c) Regarding Bernard F. Fein.

With respect to paragraph I, subsection VI of the Court’s Judgment [C. T.] referring to the statements made by the Stockholders’ Protective Committee

regarding Bernard F. Fein, the evidence was clear that the material of the Stockholders' Protective Committee did state that Bernard F. Fein was *Chairman* of the Executive Committee at a time when certain losses were sustained by United Industrial Corporation. This was in error because at that time Bernard F. Fein was only a *member* of the Executive Committee. Nevertheless, the evidence was also clear and unrebutted that this error was an oversight on the part of the attorneys for the Committee and that the Stockholders' Protective Committee was never given an opportunity to make a retraction of this statement for the reason that the Securities and Exchange Commission brought this action before the Stockholders' Protective Committee could send out their next mailing and further solicitation was thereafter enjoined.

Under any circumstances, this statement does not appear to have great materiality.

IV.

The Court Erred by Making an Unconstitutional Application of Regulation 14 of the Securities and Exchange Act of 1934 to the Facts of This Case and Appellants Were to Be Denied Due Process of Law as Guaranteed by the Fifth Amendment to the Constitution of the United States.

The courts have, on rare occasions, considered the constitutionality of the Securities and Exchange Act of 1934 and the Rules and Regulations promulgated thereunder. The constitutional issues involved concerning the Securities and Exchange Act of 1934 involved primarily procedural due process and freedom of speech as guaranteed under the Fifth Amendment to the Constitution. The case of *Securities and Exchange Com-*

mission v. May, 134 Fed. Supp. 247 at 256-257 specifically upheld the constitutionality of Rule 14(a)9 of the Rules and Regulations under the Securities and Exchange Act of 1934. A similar holding was made in the case of *Halsted v. Securities and Exchange Commission*, 182 F. 2d 660 C. A. D. C. Appellants do not dispute this line of cases.

Appellants do contend, however, that the application of the Rules and Regulations as made by the trial court herein denied appellants fundamental due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

This is so for the reason that the injunction issued by the Court against the appellants requires the individual appellants as members of the Stockholders' Protective Committee to state in any subsequent soliciting material substantially as follows:

That Gira and Petersen were "*instrumental in initiating and organizing the Committee*" and in "*formulating the Committee's slate of directors*"; that Gira and Petersen had "*participated with representatives of the Stockholders' Protective Committee and with members of the Committee itself in soliciting*" and that they had "*aided and abetted*" the Committee and that they are "*members*" of the Stockholders' Protective Committee. [C. T., Appendix B.]

As has been demonstrated in the previous discussion under item III in this Brief, these statements concerning Gira and Petersen are not statements of fact as such, but are statements of conclusions which are purportedly taken from facts.

Leaving aside for the moment the question of whether or not the conclusions purportedly taken from the facts

are lawful, the further question presented is whether, assuming that a proxy solicitation conveys to the stockholders all of the material facts surrounding a particular transaction or issue, CAN THE SOLICITOR NEVERTHELESS BE GUILTY OF MAKING FALSE AND MISLEADING STATEMENTS FOR THE SIMPLE FAILURE TO STATE THE CONCLUSIONS OR INFERENCES THAT MIGHT LOGICALLY BE TAKEN FROM THE FACTS STATED?

A similar question was presented to the Court in the case of *Doyle v. Milton*, 73 Fed. Supp. 281.

In that case, the Court, finding that a proxy statement was not misleading, indicated that if the proxy solicitor had stated to the stockholders sufficient data from which an inference of “*selfish motive*” might be inferred, the solicitation statement would not be declared false and misleading merely because it omitted “a confession of selfish motive.”

The Fifth Amendment of the United States Constitution states, in pertinent part, as follows: “No person shall . . . be deprived of life, *liberty*, or *property*, without due process of law; . . .”

It is self-evident that the injunction in this case purports to deprive appellants of their property rights in the proxies given to them by stockholders of United Industrial Corporation; in addition, it can be demonstrated that a question of procedural due process is involved in this case.

It has long been established that an indispensable ingredient of procedural due process is the requirement that for one to be wrongfully charged with violation of

a statute or other regulation he must have previous fair notice, actual or constructive, of what acts are prohibited. (*Winters v. State of New York* (1938), 330 U. S. 507.)

Rule 14(a)9 simply provides that a person must state the material FACTS necessary to make a proxy soliciting statement not misleading. There is no suggestion in the Rule or in the Regulation under which it is promulgated that one must state more than facts. Yet for the trial court in this case to invalidate the proxies of the appellants, and also to form the basis of its injunction against the appellants, it was necessary that the Court APPLY Rule 14(a)9 to the facts of the case to mean that appellants were guilty of making false and misleading statements for failure to state, IN ADDITION TO THE MATERIAL FACTS, CERTAIN CONCLUSIONS WHICH THE COURT HAS TAKEN FROM THE FACTS.

This is clearly a denial of procedural due process. The appellants had a constitutional right to rely upon the clear meaning of Rule 14(a)9 and should not be held accountable for an extension of the Rule by the trial court which is not clearly delineated in the Regulation or the Rules. An *application* of a statute or regulation which infringes upon rights guaranteed in the Bill of Rights is an unconstitutional application.

Since the appellants were deprived of fair notice that such an application of the regulation would or could be made, they have been denied procedural due process even if the conclusions embodied by the trial court in its injunction WERE ONES WHICH CAN BE LOGICALLY DEDUCED FROM THE FACTS.

V.

Argument on the Findings of Fact.

Appellants find it necessary to make a detailed attack upon the purported Findings of Fact and Conclusions of Law of the Court for the reason that these Findings of Fact and Conclusions of Law will in all probability determine the final attitude of the stockholders in the United Industrial Corporation election of directors. Therefore, the appellants are making a detailed attack on the Findings of Fact in order that the Appellate Court may make proper orders for the correction of those Findings which are either clearly erroneous, argumentative, or superfluous and inappropriate to the judgment.

The purpose of requiring findings of fact is to aid the appellate court by affording it a clear understanding of the basis of the decision of the trial court (*United States v. Horsfall* (C. A. 10th, 1959), 270 F. 2d 107; *Irish v. United States* (C. A. 9th, 1955), 225 F. 2d 3).

“Another purpose of requiring Findings of Fact and Conclusions of Law is to make definite just what is decided by the case in order to apply the doctrine of estoppel and *res judicata* to future cases.” [Nordbye, Improvements in Statement of the Findings of Fact and Conclusions of Law (1940), 1 F. R. D. 25.]

The requirement that Findings of Fact be made is intended to evoke care on the part of the trial judge. Ascertaining the facts is the most important function of such Findings. (*United States v. Forness* (C. A. 2nd, 1942), 125 F. 2d 928.) “Findings should represent the judge’s own determination and not the long,

often argumentative, statements of successful counsel.” (*United States v. Forness, supra*; *United States v. Crescent Amusement Co.* (1949), 323 U. S. 173.)

Findings and Conclusions which represent the independent judicial labors and study of the District Judge are more helpful to the Court of Appeals. (*Kinnear Weed Corp. v. Humble Oil and Refining Co.* (C. A. 5th, 1958), 259 F. 2d 398; *Edward Valves, Inc. v. Cameron Iron Works* (C. A. 5th, 1961), 289 F. 2d 355.)

It is not proper for the trial court to adopt an opinion drafted by one of the parties and it has been held that if the opinion is drafted by one of the parties and adopted by the trial court without notice to the other parties, it is a denial of due process of law. (*Chicopee Mfg. Corp. v. Kendall Co.* (C. A. 4th, 1961), 288 F. 2d 719.)

Findings upon matters which are superfluous or immaterial or inappropriate to the decree should not be made. (*In re Imperial Irrigation District* (D. C. Cal., 1941), 38 Fed. Supp. 770; affirmed 136 F. 2d 539.)

With the above in mind, the appellants hereby set forth their objections to the following purported Findings of Fact made by the trial court (set out at length in Appendix B):

A. That portion of Finding No. 5 which reads:

“Roemer had been house counsel for U. S. Science, a subsidiary of UIC, from early 1959 until late in December, 1960.”

is clearly erroneous for the reason that there is no evidence to support the finding that Roemer had been “house counsel,” as that term is ordinarily used. The only testimony concerning this subject is that of Roe-

mer, who testified that he had acted as attorney for U. S. Science Corporation during 1960. [R. T. 211-212.] Roemer has never been an employee, as such, of either U. S. Science or UIC, but has been associated with his present law firm since his admission to the Bar in 1954 and has been a partner for several years.

B. That portion of Finding No. 6 which reads:

“Gira was joined by Petersen during subsequent conferences with Brandlin and Roemer. From the commencement of these conferences, it was *agreed* that one effective way of combating the charges of misfeasance which UIC’s management intended to bring against Gira and Petersen would be for them to *regain control* of UIC through a proxy contest.” (Emphasis added.)

is clearly erroneous, because it is not supported by any evidence in the case. There is not one iota of evidence in the whole record to indicate: (a) that at any time there was an “agreement” of any kind among Brandlin, Roemer, Gira and/or Petersen that one effective way of combating threatened litigation would be for Gira and Petersen to regain control of UIC through a proxy contest; and (b) that at any time the four persons concerned ever arrived at any “agreement” as to what should be done about the “threatened litigation.” There is also no testimony that Gira and Petersen were attempting to regain control of UIC through this Committee. On the contrary, all of the evidence, and the Court’s decision by inference [C. T.], establish clearly that the slate of the Stockholders’ Protective Committee was completely independent and had no agreement of any kind with Gira and/or Petersen.

The testimony regarding meetings among the four persons (Gira, Petersen, Brandlin and Roemer), subsequent to the first meeting at Malibu, came from Brandlin, Roemer, Gira and Petersen. The evidence showed that there were only two subsequent meetings among Gira and/or Petersen and/or Roemer and Brandlin. One was during the middle of the week of January 24th and the other was on January 27th.

Brandlin's Testimony.

Brandlin testified that a few days before Gira and Petersen delivered the stockholders' list to the law firm, Gira, *alone*, had come in to see Brandlin and Roemer, at which time Brandlin advised Gira that he knew of nothing that could be done about any threatened litigation and that they would just have to wait and see what happened. Brandlin also advised Gira that he could see no reason for Gira or Petersen to become involved in a proxy contest. Gira stated that he was not interested in a proxy contest and had enough to do with other problems. [R. T. 1247, 1248.]

Roemer's Testimony.

Roemer did not testify concerning the aforementioned meeting with Brandlin, but testified that the next meeting that he recalled after the Malibu meeting was with Gira and Petersen on the 27th of January, at which time they delivered the stockholders' list, and that the meeting was quite short and that the only discussion at that time was concerning the names and locations of some of the larger stockholders who were included on the list. [R. T. 224, 227.]

Gira's and Petersen's Testimony.

Neither Gira nor Petersen was specifically questioned in the trial concerning the meeting testified to by Brand-

lin, but both testified to the meeting concerning the delivery of the stockholders' list in substantially the same terms as those discussed by Roemer. [R. T. 80, 81, 395.] In the SEC transcript of testimony of both Gira and Petersen there is some indication that at the meeting which Brandlin referred to with Gira, Petersen was also present but this testimony was not admitted as against the Stockholders' Protective Committee appellants and, therefore, is not part of the evidence on which a Finding against appellants can be predicated.

C. The statement from Finding No. 6 as follows:

"Gira and Petersen agreed that they were not in a position to be *openly identified* with any group intending to conduct a proxy contest." (Emphasis added.)

is a clearly erroneous and also inappropriate Finding. The clear innuendo from such a statement is that it was planned that Gira and Petersen were to be *covertly* or *clandestinely* identified with such a group. The only witness who testified directly concerning the conversations alluded to in this Finding was Brandlin who, in discussing the meeting which took place with Gira alone, in Brandlin's office, in between the Malibu meeting and the date on which the stockholders' list was delivered, testified that Gira had concurred with Brandlin that he "*was not interested in becoming a participant in a proxy contest.*" [R. T. 1248.] It is interesting also to note that the attorney representing the plaintiff SEC indicated on more than one occasion that he thought that Brandlin's testimony was quite "candid" and that he believed it. [R. T. 1513, 2212.]

D. The statement in Finding No. 6 that:

“They were given *assurances*, however, that Brandlin and Roemer would be willing to undertake a proxy contest if it could be arranged that other *seemingly independent* stockholders would urge that such a contest be undertaken,” (Emphasis added.)

is clearly erroneous, because it is directly contrary to substantial evidence presented on the subject. The words “seemingly independent” imply *not truly* independent. There is an innuendo of some type of fraudulent conspiracy.

The evidence is clear and unrefuted that many of the slate of the Stockholders’ Protective Committee either did not know Gira and Petersen (Soderstrom, McLaughlin, Zodda, Steel, Poe and Lawry) or had only a slight acquaintance with them (Henwood and Foss) or did not care for their way of doing business (Beshara) [R. T. 9a, 1669, 1714, 2054, 2059-2060, 2070, 2190; Ex. 13.] The innuendo in the court’s Finding No. 6 is completely without foundation in the evidence.

The statement that “they were given assurances” is again contrary to the evidence. The only testimony on the meeting referred to in this statement was that of Brandlin, and his testimony was that the law firm “*might*” be interested, but it was dependent upon certain contingencies which Brandlin would have to personally ascertain. Certainly there was no indication that Brandlin was *assuring* Gira and Petersen that he would conduct a proxy contest in their interest. [R. T. 1247-1250.]

E. The statement in Finding No. 7 that:

“at the time the list was duplicated no stockholders of UIC other than Gira and Petersen had approached counsel for the Committee to discuss a proxy contest.”

is clearly erroneous, because it is contrary to the substantial evidence in the case.

Yaras testified that he had talked to Brandlin by telephone concerning his interest in a change of Management of UIC several days before the date on which the stockholders' list was duplicated. [R. T. 988.] Brandlin testified that Yaras had contacted him personally by telephone and that Dumont had delivered a message through Summers before the date on which the stockholders' list was duplicated. [R. T. 1232, 1594.] Summers' affidavit [R. T. 2179-2184] confirms this and Dumont testified substantially the same. [R. T. 1724.]

F. The statement in Finding No. 7 that:

“It is uncontradicted in the record that after Brandlin and Roemer made it clear that a successful proxy contest could not be mounted without a current stockholders' list, Robert Gira, who remained as President of U. S. Science for a short time after his brother, Bernard Gira, had resigned, asked an employee of UIC to ‘steal’ the stockholders' list for him. A new stockholders' list as of December 30, 1960, had been delivered to UIC from New York on January 14, 1960. (sic) No duplicate of this list existed at this time. The employee refused to do so. Shortly thereafter, the list as of December 30, 1960, was removed surreptitiously from the executive offices of UIC, and was delivered late Friday, January 27, 1961,

by Gira and Petersen to the offices of counsel for the Committee where a duplicate was made by the law firm at its own expense.”

is a clearly erroneous finding as to these appellants for the reason that it is completely without foundation in the evidence.

THE RECORD CLEARLY SHOWS THAT ALL TESTIMONY CONCERNING THE MANNER IN WHICH THE STOCKHOLDERS’ LIST WAS TRANSFERRED FROM THE POSSESSION OF UIC HEADQUARTERS TO PETERSEN WAS RULED INADMISSIBLE BY THE TRIAL COURT AS TO THE APPELLANTS HEREIN. [R. T. 54, 58, 62, 164, 189, 192, 200.] The only testimony with respect to how the stockholders’ list came into the possession of Petersen, which was admitted against the appellants, was the testimony of Petersen himself, who indicated that the list was included among certain books, papers and personal effects which were transferred from his offices at UIC to his home. [R. T. 67, 69, 70, 72.]

G. Finding No. 9 should be stricken in its entirety, because it is an improper finding in that it does not purport to “find” ultimate facts, but purports to recite portions of the testimony. While it may be proper for a court in evaluating testimony to come to a finding or conclusion of an ultimate fact based upon only a portion of testimony, which portion the court believes to be accurate as distinguished from other portions of the testimony, it is completely improper to purport to recite testimony (rather than reciting a finding of fact), but actually to leave out pertinent portions of the testimony in such a manner as to distort the meaning of such testimony.

The recital of testimony in this case is distorted for the reason that it fails to state that when Roemer was interrogated by members of the SEC staff and asked where the list was first made available to him, his first answer was that this had been in his law office. [R. T. 264-268.] Later in his testimony, it is true that he did acquiesce in the suggestion of the questioner that he had received the list at Gira's house. [R. T. 261.] Several weeks later, he sent a letter to the SEC and advised them that he had checked his records and corrected his testimony to show that he had received the list at the office. [Ex. 17, R. T. 265-266.] Roemer explained to the court that he had become confused in his mind concerning the chronological order of the meeting in Malibu and the meeting in the offices of Vaughan, Brandlin & Baggot. [R. T. 267-268.]

The statement "that Roemer did not disclose to the SEC staff that his law firm had duplicated the list nor did he disclose the strange circumstances under which the list had been returned to UIC offices on a Sunday afternoon" is not only argumentative, but is misleading because no such questions were ever asked of Mr. Roemer by the SEC.

This whole finding is superfluous and inappropriate to the judgment. Its only efficacy would be to serve as proxy soliciting material. The basic fact of from *whom* the stockholders' list came was disclosed to the SEC and the UIC stockholders. [Ex. 13.]

H. Finding No. 11, which states:

"The evidence establishes beyond question that without the knowledge or consent of management, the stockholders' list was removed from the executive offices of UIC during the week ending

January 28, 1961 (probably on Friday, January 27)”

and

“Indeed, the record sustains the contention of the SEC that the stockholders’ list was stolen”

is clearly erroneous for the reason that it is UNSUPPORTED BY ANY EVIDENCE WHICH WAS INTRODUCED AS AGAINST THESE APPELLANTS. All such evidence was objected to by the appellants and the objections were sustained as to them. [R. T. 54, 58, 162, 164, 189, 192, 200.]

I. The language in Finding 12 that:

“It was also essential that counsel for the Committee represent, *at least ostensibly*, some stockholders of UIC before setting about to organize an insurgent Committee” (Emphasis added.)

and the language that:

“It had already been decided that Gira and Petersen could not *openly participate* in the contest with the Committee and they could not be held out as clients of the law firm” (Emphasis added.)

is not only argumentative, but is entirely misleading and clearly erroneous in the light of the substantial evidence [R. T. 1248-1249] as pointed out in our discussion of Finding No. 6 in paragraph B.

J. The statement in Finding No. 12 that:

“Gira and Petersen then communicated with Roy L. Williams and Elmer M. Luther, Jr.”

is completely contrary to the evidence and clearly erroneous. The only evidence on this subject came from the testimony of Yaras and the transcript of testimony before the SEC of Luther and Williams (which was only

admitted as against the individual person involved in such transcript.) [R. T. 1029-1032.] The uncontradicted testimony of Yaras before the trial court [R. T. 966] and the transcript of testimony of Luther before the SEC [R. T. 1040] was that Luther had contacted *Yaras* (*not* Gira or Petersen) who referred Luther to the law firm. The transcript of testimony of Williams before the SEC [R. T. 1095] was that Williams *contacted* Gira, who referred Williams to the law firm.

K. The language in Finding No. 12 that:

“It had already been decided that Gira and Petersen could not *openly participate* in the contest with the Committee and they could not be held out as clients of the law firm” (Emphasis added.)

is clearly erroneous because it implies that Gira and Petersen did participate *covertly* and *clandestinely* in the contest. The testimony regarding this subject was basically that of Brandlin. [R. T. 1248.] Neither Roemer, Gira nor Petersen contradicted Brandlin in this regard.

L. The statement in Finding No. 13 that Williams “did not, however, authorize the bringing of a proxy contest in his behalf”

and the statement in Finding No. 14 that Luther

“did not authorize Roemer to initiate a proxy contest”

is clearly erroneous in the light of the clear weight of the substantial evidence. The testimony on this subject came from the transcript of testimony of Luther before the SEC [R. T. 1040, 1041], the transcript of testimony of Williams before the SEC [R. T. 1122] and the affidavits of Luther and Williams [Exs. 45, S] and the testimony of Roemer [R. T. 230], all of

whom indicate, without doubt, that BOTH LUTHER AND WILLIAMS AUTHORIZED ROEMER TO TAKE WHATEVER STEPS WERE NECESSARY TO PROTECT THEIR INTEREST.

M. The language in Finding No. 14 to the effect that Luther

“discussed the situation with Petersen who suggested that he communicate with Roemer”

is clearly erroneous because it is completely without support in the evidence. The uncontradicted testimony of Yaras [R. T. 966] in the trial and of Luther in his transcript of testimony before the SEC [R. T. 1040] was that Luther contacted *Yaras* (*not* Petersen), who suggested that he communicate with Roemer.

N. The statement in Finding No. 14

“The assertion in the Committee’s proxy statement that counsel for the Committee started the organization of the Committee on behalf of Luther and Williams is seriously misleading”

is a misleading statement in itself and finds no support in the evidence. There is no statement in the literature of the Committee or the testimony that the organization of the Committee was “on behalf” of Luther and Williams. The literature states that the organization of the Committee (slate) “started after” [Ex. 13] Luther and Williams had authorized the firm to take the necessary steps. It is self evident that Brandlin was purporting to act on behalf of the whole Stockholders’ Protective Committee after it was formed.

O. The language in Finding No. 15 that

“Gira and Petersen again met with counsel for the Committee to . . . agree upon the approach to be made to stockholders with significant holdings”

is clearly erroneous and wholly unsupported by the evidence. The uncontradicted testimony of Gira [R. T. 395], Petersen [R. T. 79-81] and Roemer [R. T. 223-226] concerning the meeting referred to is that it was a short *casual* meeting and the only thing discussed was the names of the larger stockholders in UIC. There is no testimony of any kind that counsel for the Committee ever discussed with Gira and Petersen an “*approach to be made to stockholders with significant holdings.*”

P. The language in Finding No. 17 that
“having *inspired* the organization of the Committee” (Emphasis added.)

is not only argumentative, but is clearly erroneous in that the uncontradicted testimony of Brandlin [R. T. 1262] and Roemer [R. T. 228, 232-233] is that Brandlin was the first person to discuss the organization of a Committee and proceeded to so organize the Committee on his own terms.

Q. The language in Finding No. 18 that
“Late in February, 1961, Gira and Petersen, Elwood S. Kendrick, who had been retained by them to defend the litigation brought by the management of UIC, Brandlin, Roemer and Stanley E. Henwood, who was then a potential member of the Committee, met to discuss the affairs of UIC”

is clearly erroneous because there is no evidence that these men met to “discuss the affairs” of UIC. The testimony by all parties concerned in the meeting was that the meeting was called at the request of Henwood and Brandlin so that Henwood would learn about the *type of business* of United Industrial Corporation and its subsidiaries. The testimony clearly shows that the

subjects discussed at this meeting were for the sole purpose of educating Henwood regarding the scope of business fields in the UIC subsidiaries and at no time were the “affairs” of UIC discussed. [R. T. 142, 144, 287-288, 291-295, 1264-1265, 1668-1669.]

R. Finding No. 19 that

“Gira, Petersen, Brandlin and Roemer met again in April, 1961, at Kendrick’s law offices to decide what action they could take to counteract the charges in management’s proxy material that Gira and Petersen were closely related to the Committee. Counsel for the Committee suggested that Gira and Petersen institute a libel suit against the management.”

is clearly erroneous for the reason that the uncontradicted testimony of Brandlin [R. T. 1263-1264] was that the parties met in Kendrick’s law office for the purpose of deciding what could be done to counteract charges that management was threatening to make in its proxy material that the Stockholders’ Protective Committee was “*fronting*” for Gira and Petersen. Counsel for the Committee did not suggest that Gira and Petersen institute a *libel suit*, but suggested that Gira and Petersen *send a telegram* advising management that if they made such statements their statements could be libelous. This statement is further clearly erroneous in that there is no evidence that Roemer attended this meeting and, in fact, Roemer did not attend this meeting.

S. In Finding No. 20, the statement

“It was with events occurring in July, 1961, that Gira and Petersen assumed even more active roles as participants in the proxy contest.”

is argumentative in that it assumes that Gira and Petersen have previously participated, and because it fails to distinguish that the libel suit which Gira and Petersen filed in July of 1961 was based on an entirely different set of circumstances than the threatened libelous statements referred to in Finding No. 19. [Ex. 20, R. T. 422-429, 1350-1351.]

T. The complete statement in Finding No. 20 and Finding No. 21 should be stricken as being clearly erroneous, immaterial and therefore prejudicial to the appellants herein for the reason that all of the evidence alluded to in Findings Nos. 20 and 21 was adduced on the testimony of Gira, Petersen and Lewis and Exhibit No. 19. In each instance a valid objection was made by appellants which was sustained by the trial court and such evidence was never admitted as to the appellants.

U. In Finding No. 22, the statement that:

“The Committee has never actually functioned as an association; all of its members have never been assembled together at one time. Since its formation there has been only one meeting, and that one involved several, but not all, of the Committee’s members. Brandlin and Roemer have met with Gira and Petersen on many more occasions than they have met with members of the Committee. The Committee is merely an imposing ‘letterhead’ association, most of whose members were selected by and agreed to serve as an accommodation to counsel for the Committee . . . Such a *seemingly independent* group was necessary as Brandlin and Roemer knew that stockholder support would not be forthcoming if Gira and Petersen, the true *sponsors* of the Committee, participated *openly* as members.” (Emphasis added.)

is clearly erroneous and cannot be supported by any evidence. The testimony did not purport to establish ALL the meetings, but the uncontradicted evidence showed there were at least two formal meetings on the west coast. [R. T. 1713.] There is no evidence that the Committee “is merely an imposing ‘letterhead’ association.” This is obviously argumentative, an opinion, and a conclusion unsupported by the evidence. Each of these men is prominent in his field and the testimony of those members who testified evidenced an interest in the Committee and an uncontradicted independence of thought and conduct. “Most” of the members did not serve as an “accommodation to counsel”. Certainly, long-time stockholders such as Armogida, Ballance, Dumont, Beshara and Wulfekuhler have a real interest; namely, their investment. [Ex. 14; R. T. 1725-1726, 1728, 1734-1735, 1740, 2040-2041, 2050, 2054-2058.] Poe [R. T. 2069], Foss [R. T. 2074-2075] and Henwood [R. T. 1673-1674] testified without contradiction that they are independent of thought and action and that they have an interest in this proxy contest. Mr. Soderstrom states that he heard from Mr. Brandlin “quite frequently” [R. T. 1700], that he would be interested in buying more UIC stock [R. T. 1706] and that he was completely independent. [R. T. 1715.] He also had various meetings with Roemer and discussed “many phases” about the company. [R. T. 1711]. As for Mr. Lawry, all parties, including the SEC, stipulated that he was “an honest and distinguished gentleman.” [R. T. 2190.] Furthermore, Mr. Lawry was present in court virtually every day of the trial [R. T. 2191], and testified without contradiction as to his independence. [R. T. 2192-2193.] Summers testified

by affidavit that he was instrumental in bringing Dumont to the Committee and that he would act independently of any outside influence. [R. T. 2180-2183.] Mr. McLaughlin, by affidavit, testified that he considered that this was “an opportunity to make a profit on the stock of United Industrial Corporation if said company was properly managed.” He further stated that he became a member of the slate “upon the request of my son-in-law, J. J. Brandlin,” but that he “agreed to serve as a member” after making an independent investigation. [R. T. 2185-2189.]

Roemer’s participation in the proxy contest as a member of the slate is understandable, although there is no evidence on this subject. Lawyers usually consider it an honor and a business asset to serve on the Board of Directors of large corporations.

If it can be said that anyone “agreed to serve as an accommodation to counsel”, it would have to be found in Henwood’s testimony. [R. T. 47a—portion of deposition in *UIC v. Henwood*.] However Henwood did not finally agree to serve until after he had obtained more information about the company. This occurred approximately four weeks after the initial request to serve was made. [R. T. 1668-1669, 1673-1674.] Henwood agreed to serve as Chairman of the Committee. [R. T. 1668.] His office in New York served as the Committee’s New York office. [Ex. 13.] He voluntarily went to Washington, D. C., to testify before the SEC in March, 1961. [Ex. 38.] Even if we assume that Henwood served as an “accommodation to counsel”, does one of fifteen men constitute “most” of the members of the Committee? We submit that Finding No. 22 is clearly erroneous and wholly unsupported

by evidence. The evidence clearly establishes that the Committee was spread from coast to coast [Ex. 13], and that constant and frequent communication was had with all members of the Committee. Brandlin testified, without contradiction, that there were frequent telephone conversations and that over 100 letters and reports were mailed or delivered to the Committee during the course of the proxy contest [R. T. 1342-1344], in addition to the meetings referred to.

It is clearly erroneous to find that the Committee and slate were a “seemingly independent group” since this clearly implies that the Committee and slate were not independent; and there is no evidence of any kind to support such a finding. The evidence is all to the contrary. Each member of the slate who testified stated that he would act independently and that he had no contract, arrangement or understanding of any kind whatsoever with Gira and Petersen. There is likewise no evidence to support the finding that Gira and Petersen were “the true sponsors of the Committee” and that Brandlin and Roemer knew that Gira and Petersen could not “openly” be members of the Committee. There was never any effort by Brandlin or Roemer to *hide* from the stockholders the fact that Gira and Petersen were helpful to the Committee. [Exs. 13, A.]

V. Appellants have conceded that the error referred to in Finding No. 23 was made. [R. T. 271.] The testimony is uncontradicted that the SEC advised that Fein was not Chairman during 1960 and that references to this fact should be changed, but, through oversight, the Committee neglected to change the one reference referred to although other changes in this regard

were made. [R. T. 311.] The statement, however, is innocuous and immaterial due to the fact that the evidence, uncontradicted, is that Fein was a *member* of the Executive Committee during 1960, as opposed to Chairman. [R. T. 270.] The erroneous statement is immaterial and could not have had any effect on the vote of the stockholders, nor was there any evidence that this admitted error was material in that it affected the vote of the stockholders. Since the Stockholders' Protective Committee had been "cooperative" with the SEC staff, the SEC staff should have asked for a retraction from the Committee instead of bringing action. This is the manner in which they handled a similar matter for one of management's mailings. [Ex. 14.]

W. In Finding No. 24 the statement that:

"As Gira and Petersen initiated the Committee, and have participated, directly and indirectly, in directing and advancing its objectives . . ."

is argumentative and clearly erroneous in that it assumes that Gira and Petersen have participated and there is no evidence to support the finding that Gira and Petersen had been "directing and advancing its (the Committee's) objectives." The evidence, as demonstrated above, is all to the contrary.

X. That portion of No. 6 under the heading "Affirmative Defenses", on page 20 of the Findings of Fact [C. T.] which states as follows (Appendix B):

"The defendants have also stressed that Management of UIC from the beginning of its solicitation has stated that the Committee was 'fronting' for Gira and Petersen and that, *therefore, the stockholders are fully aware of all the facts.*" (Emphasis added.)

is a clearly erroneous finding for the reason that appellants have never stated that Management's accusation that appellants were "fronting" for Gira and Petersen made the stockholders fully aware of all the facts. There is no statement or other evidence in the entire record to support this statement which was prepared by counsel for the SEC and adopted by the trial court.

VI.

The Court Erred by Not Denying to the Appellee (SEC) the Equitable Remedy of Invalidation of Appellants' Proxies and of an Injunction Against Appellants for the Reason That Appellee (SEC) Had Denied Appellants Due Process as Guaranteed by the Fifth Amendment to the United States Constitution by the Manner in Which Appellee Had Administered the Securities Exchange Act and the Regulations Promulgated Thereunder in This Case.

The substantial evidence was clear and uncontroverted that as early as March, 1961, the Securities and Exchange Commission had taken testimony of Williams, Ballance, Wulfekuhler, Lawry, McLaughlin, Soderstrom, Luther, Henwood, Roemer, Gira, Petersen and Yaras. [Exs. 29-39A.] In addition, they had other information from the attorneys representing the Stockholders' Protective Committee such as Brandlin's letter of March 24th. [Ex. D.] The stated purpose of this inquiry was for the purpose of determining "the adequacy and accuracy of the proxy solicitation material of the Stockholders' Protective Committee". [R. T. 1166, 1169; Ex. 42.] After this information had been obtained, the Securities and Exchange Commission "cleared" four mailings of the Committee.

The evidence clearly shows that the Stockholders' Protective Committee cooperated with the Securities and Exchange Commission on each mailing by making the changes requested or suggested by the Commission staff. [R. T. 300-302, 308-312.]

At no time did a staff member of the Securities and Exchange Commission ever request the Committee or its attorneys to include in its material the *conclusions* and *characterizations* which were set out in their complaint and which formed the basis of the court's injunction, although the evidence is uncontroverted that as early as March and not later than June of 1961 the Securities and Exchange Commission staff had in its possession all of the essential information upon which it now claims to base its conclusions.

What happened in this case would appear to be as follows: The Securities and Exchange Commission gathered information concerning the people involved in the proxy contest. Based upon this information, they "cleared" material of the Stockholders' Protective Committee which purported to state certain facts concerning the proxy contest and the persons involved. After having "cleared" the material on three separate occasions, including July 11, 1961, the SEC then brought an action against the appellants to invalidate their proxies and obtain an injunction against them on the grounds that the statements made by the Protective Committee, and "cleared" by the Securities and Exchange Commission, had not been couched in particular terminology or phraseology.

Assuming for the sake of argument, that the particular terminology or phraseology consisted of inexorably

logical conclusions from the facts in possession of the SEC, the fact remains that at no time did the SEC ever request such terminology or phraseology from the Stockholders' Protective Committee.

The SEC has always claimed that Section 26 of the Securities and Exchange Act of 1934, which states in pertinent part as follows:

“No action or failure to act by the Commission . . . in the administration of this title . . . with regard to any statement or report filed with or examined by such authority pursuant to this title . . . be deemed a finding . . . that such statement or report is true and accurate on its face or that it is not false or misleading. . . .”*

gives them the right to conduct themselves in this manner. It is submitted that Section 26 has no application to the situation involved herein. Section 26 merely means that if the SEC has “cleared” material, that they are not to be prevented from bringing an action if it is later determined that the material contains false and misleading statements as to *material facts*. That is considerably different from taking the position that the SEC can clear a particular statement of facts and then later complain because the same facts are not stated in particular words or phraseology. (*Hatahley v. United States*, 351 U. S. 173.)

*For complete terminology of this section, consult Appendix A.

VII.

The Court Erred by Denying the Appellants a Fair Trial as Guaranteed by the Due Process Clause of the Fifth Amendment in That the Court Failed to Exercise Genuine Judicial Discretion and Judgment.

It is not uncommon for persons aggrieved by a particular decision of a court of law or equity to feel that they have not been given a fair trial. Recognizing the subjective perspective any argument on this question must necessarily have, appellants request this court to examine the following enumerated portions of the Reporter's Transcript on appeal in order to make an objective appraisal of whether or not the trial court actually exercised genuine judicial discretion and judgment as is inherent in procedural due process. [R. T. 17a-41a, 72a-152a, 54-58, 199, 550-555, 848-849, 1180, 1456-1457, 1459-1460.]

VIII.

Conclusion.

Appellants believe they have fully demonstrated that the Judgment and Findings in the case at bar are unsupported by any evidence and are clearly erroneous. It is respectfully submitted that the judgment should be reversed and the cause remanded to the trial court with directions to enter a judgment for the appellants Stockholders' Protective Committee.

Respectfully submitted,

VAUGHAN, BRANDLIN, BAGGOT,
ROBINSON & ROEMER,

MARK P. ROBINSON,

Attorneys for Appellants.

APPENDIX "A".

Regulation 14(a)-9 Under the Securities and Exchange Act of 1934.

Rule 14a-9. False or Misleading Statements.

No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

Note. The following are some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this rule:

(a) Predictions as to specific future market values, earnings, or dividends.

(b) Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper illegal or immoral conduct or associations, without factual foundation.

(c) Failure to so identify a proxy statement, form of proxy and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter.

(d) Claims made prior to a meeting regarding the results of a solicitation.

**Regulation 14(a)-11 Under the Securities and
Exchange Act of 1934.**

**Rule 14a-11. Special Provisions Applicable to
Election Contests.**

(a) Solicitations to which this rule applies.

This rule applies to any solicitation subject to this regulation by any person or group of persons for the purpose of opposing a solicitation subject to this regulation by any other person or group of persons with respect to the election or removal of directors at any annual or special meeting of security holders.

(b) Participant or Participant in a Solicitation.

For purposes of this rule the terms “participant” and “participant in a solicitation” include the following:

(1) the issuer;

(2) any director of the issuer, and any nominee for whose election as a director proxies are solicited;

(3) any committee or group which solicits proxies, any member of such committee or group, and any person whether or not named as a member who, acting alone or with one or more other persons, directly or indirectly, take the initiative in organizing, directing or financing any such committee or group;

(4) any person who finances or joins with another to finance the solicitation of proxies, except persons who contribute not more than \$500 and who are not otherwise participants;

(5) any person who lends money or furnishes credit or enters into any other arrangements, pursuant to any contract or understanding with a participant, for the purpose of financing or otherwise inducing the purchase, sale, holding or voting of securities of the issuer

by any participant or other persons, in support of or in opposition to a participant; except that such terms do not include a bank, broker or dealer who, in the ordinary course of business, lends money or executes orders for the purchase or sale of securities and who is not otherwise a participant;

(6) any other person who solicits proxies: *Provided, however,* That such terms do not include (i) any person or organization retained or employed by a participant to solicit security holders, or any person who merely transmits proxy soliciting material or performs ministerial or clerical duties; (ii) any person employed by a participant in the capacity of attorney, accountant, or advertising, public relations or financial adviser, and whose activities are limited to the performance of his duties in the course of such employment; (iii) any person regularly employed as an officer or employee of the issuer or any of its subsidiaries who is not otherwise a participant; or (iv) any officer or director of, or any person regularly employed by, any other participant, if such officer, director, or employee is not otherwise a participant.

(c) Filing of Information Required by Schedule 14B.

(1) No solicitation subject to this rule shall be made by any person other than the management of an issuer unless at least five business days prior thereto, or such shorter period as the Commission may authorize upon a showing of good cause therefor, there has been filed, with the Commission and with each national securities exchange upon which any security of the issuer is listed and registered, by or on behalf of each participant

in such solicitation, a statement in duplicate containing the information specified by Schedule 14B.

(2) Within five business days after a solicitation subject to this rule is made by the management of an issuer, or such longer period as the Commission may authorize upon a showing of good cause therefor, there shall be filed, with the Commission and with each national securities exchange upon which any security of the issuer is listed and registered, by or on behalf of each participant in such solicitation, other than the issuer a statement in duplicate containing the information specified by Schedule 14B.

(3) If any solicitation on behalf of management or any other person has been made, or if proxy material is ready for distribution, prior to a solicitation subject to this rule in opposition thereto, a statement in duplicate containing the information specified in Schedule 14B shall be filed by or on behalf of each participant in such prior solicitation, other than the issuer, as soon as reasonably practicable after the commencement of the solicitation in opposition thereto, with the Commission and with each national securities exchange on which any security of the issuer is listed and registered.

(4) If, subsequent to the filing of the statements required by subparagraphs (1), (2), and (3) above, additional persons become participants in a solicitation subject to this rule, there shall be filed, with the Commission and each appropriate exchange, by or on behalf of each such person a statement in duplicate containing the information specified by Schedule 14B, within three business days after such person becomes a participant, or such longer period as the Commission may authorize upon a showing of good cause therefor.

(5) If any material change occurs in the facts reported in any statement filed by or on behalf of any participant, and appropriate amendment to such statement shall be filed promptly with the Commission and each appropriate exchange.

(6) Each statement and amendment thereto filed pursuant to this paragraph (c) shall be part of the official public files of the Commission and for purposes of this regulation shall be deemed a communication subject to the provisions of Rule 14a-9.

(d) Solicitations Prior to Furnishing Required Written Proxy Statement.

Notwithstanding the provisions of Rule 14a-3 (a), a solicitation subject to this rule may be made prior to furnishing security holders a written proxy statement containing the information specified in Schedule 14A with respect to such solicitation, *Provided That*—

(1) The statements required by paragraph (c) of this rule are filed by or on behalf of each participant in such solicitation.

(2) No form of proxy is furnished to security holders prior to the time the written proxy statement is required by Rule 14a-3 (a) is furnished to security holders: *Provided, however,* That this subparagraph (2) shall not apply where a proxy statement then meeting the requirements of Schedule 14A has been furnished to security holders.

(3) At least the information specified in Items 2 (a) and 3 (a) of the statement required by paragraph (c) to be filed by each participant, or an appropriate summary thereof, is included in each communication sent or given to security holders in connection with the solicitation.

(4) A written proxy statement containing the information specified in Schedule 14A with respect to a solicitation is set or given security holders at the earliest practicable date.

(e) Solicitations prior to furnishing required written proxy statement—Filing Requirements.

Three copies of any soliciting material proposed to be sent or given to security holders prior to the furnishing of the written proxy statement required by Rule 14a-3 (a) shall be filed with the Commission in preliminary form, at least five business days prior to the date definitive copies of such material are first sent or given to security holders, or such shorter period as the Commission may authorize upon a showing of good cause therefor.

(f) Application of this rule to Annual Report.

Notwithstanding the provisions of Rule 14a-3 (b) and (c), three copies of any portion of the annual report referred to in Rule 14a-3 (b) which comments upon or refers to any solicitation subject to this rule, or to any participant in any such solicitation, other than the solicitation by the management, shall be filed with the Commission as proxy material subject to this regulation. Such portion of the annual report shall be filed with the Commission in preliminary form at least five business days prior to the date copies of the report are first sent or given to security holders.

(g) Application of Rule 14a-6.

The provisions of paragraphs (c), (d), (e), (f) and (g) of Rule 14a-6 shall apply to the extent pertinent, to soliciting material subject to paragraphs (e) and (f) of this Rule 14a-11.

(h) Use of reprints or reproductions.

In any solicitation subject to this rule, soliciting material which includes, in whole or part, any reprints or reproductions of any previously published material shall:

(1) State the name of the author and publication, the date of prior publication, and identify any person who is quoted without being named in the previously published material.

(2) Except in the case of a public official document or statement, state whether or not the consent of the author and publication has been obtained to the use of the previously published material as proxy soliciting material.

(3) If any participant using the previously published material, or anyone on his behalf, paid, directly or indirectly, for the preparation or prior publication of the previously published material, or has made or proposes to make any payments or give any other consideration in connection with the publication or republication of such material, state the circumstances.

Section 26, Securities and Exchange Act of 1934.

Unlawful Representations

Section 26. No action or failure to act by the Commission or the Board of Governors of the Federal Reserve System, in the administration of this title shall be construed to mean that the particular authority has in any way passed upon the merits of, or given approval to, any security or any transaction or transactions therein, nor shall such action or failure to act with regard to any statement or report filed with or examined by such authority pursuant to this title or rules and regu-

lations thereunder, be deemed a finding by such authority that such statement or report is true and accurate on its face or that it is not false or misleading. It shall be unlawful to make, or cause to be made, to any prospective purchaser or seller of a security any representation that any such action or failure to act by any such authority is to be so construed or has such effect.

Fifth Amendment to the United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX “B”.

Judgment, Findings of Fact, and Conclusions.

JUDGMENT

This action came on for hearing before the Court as a trial on the merits between July 26, 1961, and September 22, 1961, and the Court having considered all the evidence and the arguments of counsel, and having entered a decree of dismissal as to the defendant Herman Yaras and a final decree by consent as to the defendant N. Eugene Shafer, d/b/a Shafer & Co., and having entered Findings of Fact and Conclusions of Law, as to the defendants United Industrial Corporation (“UIC”) Stockholders’ Protective Committee and the members thereof, and as to the defendants Bernard F. Gira and Herbert J. Petersen, to the effect that the Securities and Exchange Commission is entitled to a permanent injunction restraining and enjoining the defendants United Industrial Corporation Stockholders’ Protective Committee, Stanley E. Henwood, Richard I. Roemer, and Lewis M. Poe as members of and proxies for said Stockholders’ Protective Committee, and Bernard F. Gira and Herbert J. Petersen from engaging in acts and practices in violation of Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(a), and Rule 14a-9 of Regulation 14 thereunder, 17 C.F.R. 240.14a-9, in connection with the solicitation of proxies as to the common and preferred stock of UIC, and commanding the defendants Bernard F. Gira and Herbert J. Petersen to comply with Rule 14a-11 of Regulation 14, 17 C.F.R. 240.14a-11, and directing the defendant UIC to arrange for the further adjournment of the annual meeting of its stockholders for a sufficient length of time to allow for the resolicitation of proxies heretofore given to the

defendant Stockholders' Protective Committee, which proxies by the terms of this decree are invalidated, as demanded by the Securites and Exchange Commission, and it appearing that the Court has jurisdiction of the parties hereto and the subject matter hereof—

I.

IT IS ORDERED, ADJUDGED AND DECREED that the defendants United Industrial Corporation Stockholders' Protective Committee, Stanley E. Henwood, Richard I. Roemer, and Lewis M. Poe, individually and as members of and proxies for said Stockholders' Protective Committee, all members, associates, substitutes, agents, employees and attorneys of said Stockholders' Protective Committee, and the defendants Bernard F. Gira and Herbert J. Petersen, their agents, employees, and attorneys, and all persons acting in conceit or participation with any of said defendants, be and they hereby are permanently restrained and enjoined from, directly or indirectly, making use of the mails or any means or instrumentality of interstate commerce or of any facility of any national securities exchange to solicit or to permit the use of their names to solicit any proxy in respect of the common or preferred stock of UIC, or otherwise soliciting any such proxy, by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which at the time and in the light of the circumstances under which it is made is false and misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading, or necessary to correct any statement in an earlier communication with respect to the

solicitation of a proxy which has been or has become false or misleading, including the following:

(i) omitting to state that the defendants Bernard F. Gira and Herbert J. Petersen were instrumental in initiating and organizing the UIC Stockholders' Protective Committee and in formulating on behalf of said Committee a slate of directors for membership on the board of directors of UIC in opposition to the slate of directors formulated by the management of UIC;

(ii) omitting to state that the defendants Bernard F. Gira and Herbert J. Petersen have participated with representatives of the Stockholders' Protective Committee and aided and abetted said Committee and its representatives in conducting proxy solicitations in opposition to the management of UIC;

(iii) stating that the defendants Bernard F. Gira and Herbert J. Petersen are not members of the Stockholders' Protective Committee;

(iv) stating that the defendants Bernard F. Gira and Herbert J. Petersen are not participating with the Stockholders' Protective Committee in soliciting proxies in opposition to the management of UIC;

(v) stating that the formation of the Stockholders' Protective Committee was initiated solely as a result of complaints of the defendants Elmer M. Luther, Jr. and Roy L. Williams;

(vi) stating that certain losses sustained by UIC and diminution of stockholders' equity occurred during the time that Bernard F. Fein was Chairman of the Executive Committee; or

voting any proxy of any stockholder of UIC now held by the defendants UIC Stockholders' Protective Committee, Stanley E. Henwood, Richard I. Roemer or Lewis M. Poe as proxies for said Committee, or any substitute for any such defendant, or voting any such proxy which is not received pursuant to a solicitation made subsequent to the entry of this decree, in accordance with Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(a), and Regulation 14, 17 C.F.R. 240.14.

II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants Bernard F. Gira and Herbert J. Petersen shall and they hereby are commanded to comply with Rule 14a-11 of Regulation 14, 17 C.F.R. 240.14a-11, by filing with the Securities and Exchange Commission and with each national securities exchange upon which the common or preferred stock of United Industrial Corporation is registered a corrected statement in duplicate containing the information specified by Schedule 14B of Regulation 14, concerning their participation in the solicitation of proxies in respect of the common and preferred stock of UIC.

III.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant United Industrial Corporation, its officers, directors, employees, and attorneys, and each of them, be and they hereby are restrained and enjoined from holding any meeting of stockholders of United Industrial Corporation, except for the purpose of adjournment, until November 21, 1961.

IV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this action be and the same is hereby dismissed, without prejudice, as to the defendants James V. Armogida, Robert G. Ballance, Fred A. Bes-hara, Nathaniel R. Dumont, Joe L. Foss, William David Lawry, Elmer M. Luther, Jr., Edward H. McLaughlin, Charles Soderstrom, John Autry Steel, Clarence L. Summers, Roy L. Williams, Louis W. Wulfekuhler and Alfred T. Zodda, individually and as members of the United Industrial Corporation Stockholders' Protective Committee.

II.

FINDINGS OF FACT

A. Summary of Facts

1. United Industrial Corporation is a Delaware corporation. The securities of UIC are widely distributed among some 15,000 shareholders. The common and preferred stocks of UIC are listed and registered on the New York Stock Exchange and the Pacific Coast Stock Exchange. Warrants for common stock are listed and registered on the American Stock Exchange and the Pacific Coast Stock Exchange. The warrants carry no voting rights.

2. UIC commenced operations in 1960 as the product of the merger between Topp Industries Corporation and United Industrial Corporation, a Michigan corporation. Gira and Petersen, who had been the principal executive officers of Topp Industries, became the president and executive vice-president, respectively, of UIC. They also served as members of the board of directors. Bernard F. Gira owns 58,000 shares of the common stock of UIC, 5,000 shares of preferred

and 52,000 warrants. Herbert J. Petersen owns 38,500 shares of common stock, 5,000 shares of preferred and 38,500 warrants.

3. Late in 1960, it became apparent to the board of directors that the assets of UIC would be subjected to write-downs and adjustments totaling approximately \$7,000,000. One such adjustment would change a profit previously reported by Topp Industries into a substantial loss. The board of directors of UIC met on January 12, 13 and 14, 1961, to consider what action was necessary because of the impending write-downs and adjustments. In the course of these meetings Gira and Petersen resigned as officers and directors of UIC. On January 16, 1961, the New York Stock Exchange suspended trading in the securities of UIC. The Pacific Coast Stock Exchange also suspended trading in the securities. The SEC entered an order under Section 19a(4) of the Act, 15 U.S.C. Sec. 78s(a)(4), suspending trading in the securities. The effect of this order was to bar trading in the over-the-counter market as well as on the exchange.³

4. The United Industrial Corporation Stockholders' Protective Committee is an association composed of the defendants Stanley E. Henwood, Richard I. Roemer, Lewis M. Poe, James V. Armogida, Robert G. Ballance, Fred A. Beshara, Nathaniel R. Dumont, Joe L. Foss, William D. Lawry, Edward H. McLaughlin,

³On September 22, 1961, the SEC removed its bar against trading after the management of UIC and the Committee had made announcements to the Court concerning their intentions with respect to buying or selling securities of UIC in the event trading was allowed. The action of the SEC allows trading only in the over-the-counter market. The exchange suspensions remain in effect.

Charles Soderstrom, John A. Steel, Clarence L. Summers, Louis W. Wulfekuhler, Alfred T. Zodda, Elmer M. Luther, Jr., and Roy L. Williams. With the exception of Williams and Luther, the members of the Committee comprise the slate of fifteen which the Committee seeks to have elected as directors of UIC. Henwood, Roemer and Poe are named as the proxies for the Committee. Henwood is the Committee's chairman.

5. Shortly before he resigned as an officer and director of UIC, Bernard F. Gira had been negotiating to retain Richard I. Roemer as counsel for UIC.⁴ Roemer is a partner in the Los Angeles law firm of Vaughan, Brandlin & Baggot.⁵ Shortly after he resigned, Gira conferred with Roemer and J. J. Brandlin, a senior partner of the firm. At this time he sought advice as to what action he and Petersen might take to combat litigation which they expected the management of UIC to institute against them arising out of the substantial write-downs in the assets of UIC, and the suspension of trading in UIC's securities.

6. Gira was joined by Petersen during subsequent conferences with Brandlin and Roemer. From the commencement of these conferences, it was agreed that one effective way of combating the charges of misfeasance which UIC's management intended to bring against

⁴Roemer had been house counsel for U. S. Science, a subsidiary of UIC, from early 1959 until late in December, 1960. Robert Gira, who is Bernard F. Gira's brother, was president of U. S. Science. He and Roemer have been friends for many years.

⁵The firm name is now Vaughan, Brandlin, Baggot, Robinson & Roemer. The firm organized the Committee, and has served as its counsel throughout the proxy controversy. The firm has made substantial cash advances to defray the expenses of the Committee, and has estimated its contingent fees for legal service, exclusive of litigation fees, at \$75,000.

Gira and Petersen would be for them to regain control of UIC through a proxy contest.⁶ But it was also apparent that Gira and Petersen would have little chance of success in a proxy contest in which they were identified as participants with an insurgent committee, for the reason that they were the principal officers and in managerial control when the events leading to the disastrous write-downs in UIC's assets occurred. Gira and Petersen agreed that they were not in a position to be openly identified with any group intending to conduct a proxy contest. They were given assurances, however, that Brandlin and Roemer would be willing to undertake a proxy contest if it could be arranged that other seemingly independent stockholders would urge that such a contest be undertaken, if a slate of individuals of prominence could be assembled for election to the board of directors, if the services of a suitable public relations consultant could be arranged, and if a list of UIC's stockholders could be secured for the use of the opposition group. These conversations occurred during two weeks of the time Gira and Petersen were ousted from the management of UIC. There was also some discussion of a stockholders' derivative suit by Gira and Petersen but that unrealistic suggestion was discarded at once.

7. It is uncontradicted in the record that after Brandlin and Roemer made it clear that a successful proxy contest could not be mounted without a current stockholders' list, Robert Gira, who remained as President of U. S. Science for a short time after his brother,

⁶UIC has sued Gira and Petersen in Delaware for damages based on their asserted misconduct while they were officers and directors.

Bernard Gira, had resigned, asked an employee of UIC to “steal” the stockholders’ list for him. A new stockholders’ list as of December 30, 1960, had been delivered to UIC from New York on January 14, 1960. No duplicate of this list existed at this time. The employee refused to do so. Shortly thereafter, the list as of December 30, 1960, was removed surreptitiously from the executive offices of UIC, and was delivered late Friday, January 27, 1961, by Gira and Petersen to the offices of counsel for the Committee where a duplicate was made by the law firm at its own expense. Then, without advising the management of UIC that his firm had the list, Brandlin returned it to UIC’s executive offices on Sunday afternoon, January 29, 1961. At the time the list was duplicated no stockholder of UIC other than Gira and Petersen had approached counsel for the Committee to discuss a proxy contest.

8. The stockholders’ list was of the utmost value to counsel for the Committee in assembling a slate of candidates for election to the board of directors from among stockholders unfriendly to management, and in mailing out the proxy solicitation material disseminated after the Committee was organized.

9. Late in March, 1961, in the course of examining the Committee’s preliminary proxy statement which became its first mailing to stockholders, Roemer was interrogated under oath by members of the SEC’s staff and was asked, *inter alia*, to describe the circumstances under which the Committee came into possession of the UIC stockholders’ list. Roemer testified that the list was turned over to Brandlin and himself by Bernard F. Gira during an evening conference at Gira’s home in Malibu when the three first discussed a proxy con-

test. This was about ten days after Gira had resigned as president and a director of UIC. Roemer testified that he and Brandlin examined the list briefly, and that when the conference ended took the list with them. Roemer did not disclose to the SEC's staff that his law firm had duplicated the list, nor did he disclose the strange circumstances under which the list had been returned to UIC's offices on a Sunday afternoon. Rather, when asked who the list belonged to, Roemer stated he supposed it was Gira's. When asked why Gira had the list in his possession after he had resigned, Roemer testified that he did not know. At a later date Roemer attempted to correct this and similar testimony which he had given in the course of a deposition in *UIC v. Henwood* by sending a letter to the staff of the SEC to the effect that the stockholders' list had been delivered by Gira and Petersen to the law offices of counsel for the Committee, and that it had not been obtained at Gira's home in Malibu.

10. Gira and Peterson also were asked by the staff of the SEC to describe the circumstances under which they turned the list over to counsel for the Committee. Both Gira and Peterson testified that the list had been included among effects which they took with them on January 14, 1961, the day they resigned as directors of UIC. They testified that they delivered the list to counsel for the Committee on Friday, January 27, 1961.

11. The evidence establishes beyond question that, without the knowledge or consent of management, the stockholders' list was removed from the executive offices of UIC during the week ending January 28, 1961 (probably on Friday, January 27), delivered by Gira and Petersen to counsel for the Committee late Friday,

January 27, 1961, duplicated during the week-end, and returned on Sunday afternoon, January 29, 1961. Indeed, the record sustains the contention of the SEC that the stockholders' list was stolen.

12. It was also essential that counsel for the Committee represent, at least ostensibly, some stockholders of UIC before setting about to organize an insurgent Committee. It had already been decided that Gira and Petersen could not openly participate in the contest with the Committee and they could not be held out as clients of the law firm. Gira and Petersen then communicated with Roy L. Williams and Elmer M. Luther, Jr.

13. Roy L. Williams, an uncle of Bernard F. Gira, at one time had been employed by Gira as an employee of Topp Industries. As a holder of 400 shares of UIC stock, Williams became concerned about the suspension in trading and the fall in the market price of his stock. Gira suggested to Williams that he get in touch with Roemer. Williams, who was led to believe that Roemer was conducting an investigation into the situation, telephoned him and complained about his investment in UIC. Williams did not, however, authorize the bringing of a proxy contest in his behalf. He was merely seeking information concerning his investment.

14. Elmer M. Luther, Jr. previously had been an employee of UIC. His services were terminated in December 1960, shortly before Gira and Petersen resigned. Prior to his employment with UIC, Luther had been an employee of Topp Industries. As an owner of 250 shares of stock in UIC, he, like Williams, was concerned with the suspension of trading in the stock. He discussed the situation with Petersen

who suggested that he communicate with Roemer. Luther called Roemer and complained about the status of his investment in UIC, but did not authorize Roemer to initiate a proxy contest. Neither Luther nor Williams paid Vaughan, Brandlin and Baggot any retainer. Both of them, however, at Roemer's request, did sign Schedules 14B under Regulation 14 which he had prepared for them and which identified them as participants in the proxy contest. Notwithstanding this and even after it had been publicly announced that the Committee had been formed, Williams and Luther considered themselves neither members of the Committee nor clients of counsel for the Committee. Their telephone calls to Roemer were seized upon by counsel for the Committee as a mandate to organize an expensive proxy contest. The assertion in the Committee's proxy statement that counsel for the Committee started the organization of the Committee on behalf of Luther and Williams is seriously misleading.

15. Having supplied counsel for the Committee with the stockholders' list needed to organize and conduct a proxy contest, Gira and Petersen continued to aid in the formation of the Committee. To ascertain the distribution of the larger stockholdings, Gira and Petersen again met with counsel for the Committee to canvass the names on the list, and agree upon the approach to be made to stockholders with significant holdings.

16. Petersen sent Clarence L. Summers, who became a member of the Committee, to Brandlin. Summers also agreed to serve as public relations consultant to the Committee. Summers had served UIC as public relations consultant in the past. He also sought out

Nathaniel R. Dumont, who became a member of the Committee's slate.

17. Having inspired the formation of the Committee, Gira and Petersen continued to meet with Brandlin and Roemer to supply needed information, including a summary outlining the operations of UIC's subsidiaries and divisions, and confidential reports containing derogatory comments about members of the management.

18. Late in February, 1961, Gira and Petersen, Elwood S. Kendrick, who had been retained by them to defend the litigation brought by the management of UIC, Brandlin, Roemer and Stanley E. Henwood, who was then a potential member of the Committee, met to discuss the affairs of UIC. At this meeting, Gira and Petersen outlined the operations of UIC and its subsidiaries. Significantly, on the day after this meeting, Henwood became chairman of the Committee.

19. Gira, Petersen, Brandlin and Roemer met again in April, 1961, in Kendrick's law offices to decide what action they could take to counteract the charges in management's proxy material that Gira and Petersen were closely related to the Committee. Counsel for the Committee suggested that Gira and Petersen institute a libel suit against the management.

20. It was with events occurring in July, 1961, that Gira and Petersen assumed even more active roles as participants in the proxy contest, although they continued to disclaim participation. Early in July counsel for Gira and Petersen indicated to members of the staff of the SEC that in his opinion they had been libeled by statements in management's proxy material and that his clients intended to communicate with the

stockholders of UIC to deny the alleged defamatory statements. Shortly thereafter, a proposed letter addressed to stockholders by Gira was delivered to the SEC so that members of its staff could comment on it as solicitation material. This letter, although headed "THIS IS NOT A PROXY SOLICITATION," was unmistakably solicitation material. While the letter was never mailed to stockholders, it evidences the fact that Gira and Petersen were vitally interested in unseating the management slate.

21. On July 12, 1961, Gira and Petersen filed a \$2,000,000 damage suit in the Superior Court of Los Angeles County alleging that the proxy material which management was circulating to the stockholders of UIC defamed them. A few hours before this suit was filed, counsel for Gira and Petersen telephoned the SEC's staff to seek advice in connection with an announcement which had been prepared for release to news services announcing the filing of the suit. This press release described not only the filing of the libel suit, but also included a discussion of the proxy contest and named each member of the Committee's slate. The staff was urged to "clear" the release in time to make the afternoon editions of certain newspapers on the East Coast. Although counsel was advised that such a release would constitute a "solicitation" within the definition of that term in Rule 14a-1 of Regulation 14, the statement, nevertheless, was issued to the press. The text of the release makes it evident that it was in fact intended to influence stockholders of UIC to vote their proxies for the Committee and in opposition to management. The libel suit was filed two weeks before the scheduled annual meeting of stockholders, and at about

the time that the Committee's fourth and last solicitation material was sent to stockholders.

22. The Committee has never actually functioned as an association; all of its members have never been assembled together at one time. Since its formation there has been only one meeting, and that one involved several, but not all, of the Committee's members. Brandlin and Roemer have met with Gira and Petersen on many more occasions than they have met with members of the Committee. The Committee is merely an imposing "letterhead" association, most of whose members were selected by and agreed to serve as an accommodation to counsel for the Committee. Many of them were not even stockholders of UIC until Roemer purchased 2,000 shares of the stock from Herman Yaras and distributed 1,000 shares among the non-stockholder members so they could appear to have an interest in the enterprise. Yaras had been financial consultant for UIC and was a close associate of Gira and Petersen. Such a seemingly independent group was necessary as Brandlin and Roemer knew that stockholder support would not be forthcoming if Gira and Petersen, the true sponsors of the Committee, participated openly as members.

23. The Committee's proxy material also was misleading in stating that certain losses sustained by UIC and diminution of stockholders' equity occurred where Bernard F. Fein was Chairman of the Executive Committee of UIC. Fein did not become Chairman of the Executive Committee until after Bernard F. Gira and Herbert J. Petersen had resigned. The Committee contends that by inadvertence the statement was not removed from one paragraph of the Com-

mittee's last mailing to stockholders although it was removed from other paragraphs, and that in any event it was not of great significance. The statement, however, was not so innocuous as the Committee suggests. In the context in which it was made it clearly implied, contrary to fact, that Fein, Gira and Petersen shared executive and managerial responsibility in UIC during the critical period in question.

24. The Committee's proxy statement and its other three communications soliciting the proxies of stockholders of UIC have been mailed to some 15,000 shareholders. The Committee admits that its solicitations have been conducted through the mails and instrumentalities of interstate commerce. As Gira and Petersen initiated the Committee, and have participated, directly and indirectly, in directing and advancing its objectives, the Committee's use of the jurisdictional facilities is attributable to them.

B. Affirmative Defenses

1. In addition to denying that Bernard F. Gira and Herbert J. Petersen were undisclosed sponsors of the UIC Stockholders' Protective Committee, the Committee interposed certain affirmative defenses to the SEC's action. The first such defense asserted by the Committee is that, in the course of the examination of its proxy material by the staff of the SEC, all material facts concerning Gira's and Petersen's connection with the Committee were disclosed to stockholders as early as April, 1961, when the Committee first began circulating its solicitation material. The Committee contends, therefore, that the SEC should be estopped from contending that the Committee's proxy material is false and misleading.

2. The Committee's assertion is contrary to the facts. Significant events establishing the close identification of Gira and Petersen with the Committee occurred subsequent to the time the Committee first began soliciting the proxies of stockholders. As recently as July, 1961, Gira and Petersen instituted the libel suit against management, and at the same time caused a press release designed to influence votes in the election contest to be issued. Other disclosures in the Committee's proxy material are wholly inadequate in the light of facts not known to the staff when the material was commented upon. For example, it was disclosed in the proxy material that Gira and Petersen had given the Committee a stockholders' list, but the circumstances under which the list was obtained and turned over to counsel for the Committee, which, as discussed above, are highly significant in evidencing the intention of Gira and Petersen to conduct a proxy contest behind the facade of a seemingly "independent" Committee, were not disclosed. Even if the facts were as the Committee contends this defense is legally insufficient because as against the SEC the doctrine of estoppel is not available. *N. Sims Organ & Co. v. SEC*,F. 2d..... (C. A. 2, 1961); *SEC v. Culpepper*, 270 F. 2d 241 (C. A. 2, 1959); *SEC v. Morgan, Lewis and Bookins*, 209 F. 2d 33 (C. A. 3, 1953); *SEC v. Torr*, 22 F. Supp. 602 (S.D.N.Y., 1938). See also Section 26 of the Securities Exchange Act, 15 U.S.C. 78z, which specifically provides that the failure of the SEC to act "with regard to any statement or report filed with or examined by such authority pursuant to this title or rules and regulations thereunder [may not] be deemed a finding by such authority that such statement or report is true and accurate on its

face or that it is not false or misleading.” With respect to proxy solicitation material filed with the SEC, in addition to settled general principles, the statute makes it explicit that staff examination of solicitation material in no sense constitutes approval thereof, or bars a suit by the SEC to protect the public from further untrue or misleading solicitations.

3. The Committee misconstrues the effect of the examination of the Committee’s preliminary proxy material by the staff of the SEC. The staff examines and, if necessary, comments upon all preliminary proxy statements and other communications intended for distribution to stockholders. This is an administrative procedure developed by the SEC to assist all contestants in a proxy controversy to comply with the proxy rules and to avoid untrue, misleading or exaggerated claims in their communications to stockholders. In nearly all proxy controversies the basic and essential facts are peculiarly within the knowledge of the contestants. It is the inescapable obligation of the contestants themselves to make certain that all material facts are set forth in their communications to stockholders in a straightforward and understandable manner. This obligation cannot be shifted to the SEC or to its staff. *C. Subin v. Goldsmith*, 224 F. (2d) 753 (C. A. 2, 1955), *certiorari denied* 350 U. S. 883.

4. The second affirmative defense asserted by the Committee is that the SEC should be denied relief in equity because in bringing this action to invalidate the Committee’s proxies, the SEC comes before this Court with “unclean hands.” The Committee has charged that the SEC’s decision to institute this proceeding was unduly influenced by the management of UIC. The

record is barren of any evidence sustaining the accusation, and it is completely unwarranted. Indeed, in his summation, counsel for the Committee, in effect, withdrew this and other accusations that the SEC and its staff were not acting in good faith.

5. In any event, the decision to institute suits such as this is committed by statute to the discretion of the SEC. Section 21(e) of the Securities Exchange Act, 15 U.S.C. 78u(e). Again, as noted in the Court's Memorandum Decision, the record shows SEC brought this action with due regard for the voting rights of stockholders of UIC and in the public interest.

6. The defendants have also stressed that management of UIC from the beginning of its solicitation has stated that the Committee was "fronting" for Gira and Petersen and that, therefore, the stockholders are fully aware of all the facts. Such charges by management are not, however, a substitute for disclosure by the insurgents of the facts which stockholders are entitled to know when they execute proxies for the election of directors. Clearly, management's accusation is no substitute for, nor does it relieve, the insurgents from the duty to make the affirmative disclosures required by the proxy regulations.

III.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this proceeding under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa.

2. The evidence convincingly establishes that Bernard F. Gira and Herbert J. Petersen have been "participants" in the contest for control of United Indus-

trial Corporation within the meaning of Rule 14a-11(b)(3) of Regulation 14, 17 C.F.R. 240.14a-11(b)(3).⁷ The definition encompasses not only the acknowledged members of a committee, but all those who, even indirectly, initiate, direct, finance or otherwise seek to advance the objectives of a committee contending for control of a corporation.

3. The submission by the Committee of a list of nominal members, however distinguished, is all the more misleading when, as here the stockholders whose proxies are solicited, and even the members of the Committee themselves, are shielded from knowledge of the true facts concerning the origin of the Committee, and the extent to which Gira and Petersen instigated and inspired the formation of the Committee and by various means have sought to advance the Committee's objective to obtain control of UIC. While the statement in the Committee's proxy material that "nor are Gira and Petersen members of the Committee" may be correct in a formal sense, in the light of the evidence before the Court, it is clear that the omission to disclose their *de facto* participation constitutes an abuse of the solicitation process, in direct violation of Rule 14a-9 of Regulation 14, 17 C.F.R. 240.14a-9. See *S.E.C. v. May*, 134 F. Supp. 247 (S.D.N.Y., 1955), *affirmed* 229 F. 2d. 124 (C. A. 2, 1956).

4. The SEC is entitled to a decree (1) enjoining the defendants UIC Stockholders' Protective Commit-

⁷The Rule defines a "participant" to include "any Committee or group which solicits proxies, any member of such Committee or group, and any person whether or not named as a member who, acting alone or with one or more other persons, directly or indirectly, take the initiative in organizing, directing or financing any such Committee or group."

tee, Stanley E. Henwood, Richard I. Roemer and Lewis M. Poe individually and as members of and proxies for said Committee, and the defendants Bernard F. Gira and Herbert J. Petersen from violations of Section 14(a) of the Act, 15 U.S.C. §78n(a), and Rule 14a-9 of Regulation 14, 17 C.F.R. 240.14a-9 thereunder, in the solicitation of proxies in respect to the common or preferred stock of UIC to be voted at the adjourned annual meeting of stockholders; and (2) invalidating all proxies of stockholders of UIC now held by them; and (3) enjoining them from voting any such proxy which is not received pursuant to a solicitation made subsequent to the entry of the final decree in the action, in accordance with Section 14(a) of the Act, 15 U.S.C. §78n(a), and Regulation 14 thereunder, 17 C.F.R. 240.14.

5. As stated in the Court's Memorandum Decision, it is not the intention of the Court to cause any stockholder of UIC to lose his voting rights. It is within the equitable power of the Court, in enforcing the statutory prohibition against unlawful proxy solicitations, not only to invalidate proxies which have been obtained by means of misleading solicitations, but also to mold its decree to avoid such an eventuality. *SEC v. May*, 134 F. Supp. 247, *supra* and *SEC v. O'Hara Reorganization Committee*, 28 F. Supp. 523 (D. Mass. 1939). See also *SEC v. Trans American*, 163 F. 2d 511, 518 (C. A. 3, 1947), *certiorari denied* 332 U.S. 847.

6. Accordingly, the decree will provide for adjournment of the annual meeting of stockholders of UIC to a date not earlier than November 22, 1961, to allow time for the further solicitation of new proxies (in

accordance with the proxy rules) by management, the Committee, or any other committee, group, or individual, whether favoring or opposing management.

7. For the reason given in the Memorandum Decision, the circumstances do not require that the remaining members of the Committee be enjoined. Accordingly, the action will be dismissed, without prejudice, as to those defendants.

8. The SEC is also entitled to a decree directing the defendants Bernard F. Gira and Herbert J. Petersen to comply with Rule 14a-11 of Regulation 14, 17 C.F.R. 240.14a-11, by filing corrected statements containing the information required by Schedule B, concerning their status as participants in the proxy controversy.

APPENDIX "C."

Index of Exhibits.

Exhibits	Description	Marked for Identification		Admitted in Evidence	
		Date	Page	Date	Page
1	Schedule 14-B of Petersen	7/26-27	94		
2	Diagram of Building			7/26-27	158
				9/21-22	2206
3	Invoice of shareholders' list			7/26-27	162
4	Letter of transmittal on shareholders' list			7/26-27	163
5	Emery Freight Bill	7/26-27	167		
6	Receipt executed by Hamner covering stockholder list from Chemical Bank at the foot of letter heretofore received as Exhibit 4. Receipt dated 1-18-61.			8/1	189
7	Work papers of UIC relative to the stockholder list and a report to Ohio			8/1	192
8	Letter to State of Ohio dated 1-26-61			8/1	193
9	Emery Air Freight receipt			8/1	199
10	Certified copy of 14-B of Gira			8/1	201
11	Certified copy of 14-B of Yaras			8/1	202
12	Certified copy of 14-B of Yaras				
13	Copies of mailings #1, #2 and #3			8/1	205
14	Management material	8/1	207	8/1	207
				8/15	675
14-A	Definitive interim report to shareholders			8/15	676
15	Preliminary material submitted by the Stockholders' Protective Committee—certified copies	8/1	210	8/22	1016
16	Affidavit of Clerk of Chemical Bank				
17	Letter from Roemer to SEC dated 5-16-61			8/1	267
18	Papers on collateral loan for Yaras, etc.			8/2	391
19	Press release <i>re</i> libel suit			8/2	414
20	Letter from Gira to stockholders	8/2	417	8/2	429
21	Cohen letter of July 14			8/3	443

Exhibits	Description	Marked for Identification		Admitted in Evidence	
		Date	Page	Date	Page
22	Affidavit of Gordon	8/3	444		
23	Press release	8/15	633	8/15	635
24	Copy of Wall Street Journal (Jan. 17, 1961)	8/15	633	8/15	635
25	Affidavit of Bud Lewis			8/15	676
26	Roemer letter of 6-13			8/17	948
27	26th annual report of SEC	8/17	951		
28	Transcript of Luther	8/22	1017	9/12	1454
29	Transcript of Williams	8/22	1018	9/12	1454
30	Transcript of Ballance	8/22	1018	9/12	1454
31	Transcript of Wulfekuhler	8/22	1018	9/12	1454
32	Transcript of Lawry	8/22	1019	9/12	1454
33	Transcript of Gira	8/22	1019	9/12	1454
34	Transcript of Petersen	8/22	1019	9/12	1454
35	Transcript of Yaras	8/22	1019	9/12	1454
36	Transcript of McLaughlin	8/22	1020	9/12	1454
37	Transcript of Soderstrom	8/22	1020	9/12	1454
29-A	Transcript of Williams	8/22	1020	9/12	1454
28-A	Transcript of Luther	8/22	1020	9/12	1454
38	Transcript of Henwood	8/22	1021	9/12	1454
39	Transcript of Roemer	8/22	1021	9/12	1454
38-A	Transcript of Henwood	8/22	1021	9/12	1454
39-A	Transcript of Roemer	8/22	1021	9/12	1454
40	Affidavit of Risk	8/23	1132	8/23	1154
41	Affidavit of Cohen	8/23	1133	8/23	1154
42	Order of SEC directing an investigation and designating an officer to take the testimony in matter of UIC	8/23	1162	8/23	1169
43	Statement of assets and disbursements of the Stockholders' Protective Committee			9/12	1414
44	Article from Wall Street Journal			9/12	1415
45	Affidavit of Roy L. Williams			9/12	1424
46	Minutes of meeting of 1-13-61			9/12	1443
47	Testimony of Dumont			9/12	1454
48	Testimony of Hugh E. McColgan			9/12	1454
49	Affidavit of Landau			9/13	1582
50	Deposition of Manuel Cohen			9/21	2207

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C	Order for Xerox machine			8/2	331
D	Letter to SEC from Brandlin dated March 24, 1961			8/2	381
E	Documents in BSF stock purchase 1959	8/2	431	9/22	2279
F	Letter from Cohen			8/16	787
G	Telegram from Cohen	8/17	905	8/17	905
H	Diagram on Board	8/17	972		
I	Letter from Brandlin to Risk, 6-16	8/24	1302	8/24	1303
J	Affidavit of Luther			8/24	1315
K	Transmittal letter of Affidavit			8/25	1331
L	UIC file by reference			8/25	1366
M	Letter from Risk			8/25	1386
N	Deposition of Sharon Clay Risk			9/14	1655
O	Weinman	9/15	1847	9/15	1883
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BB	Releases in newspaper	8/3	482	8/3	488
CC	Releases in newspaper	8/3	482	8/3	488
DD	Releases in newspaper	8/3	482	8/3	488
EE	Kendrick's sec'y letter to SEC	8/3	513	8/3	514
FF	Letter from Kendrick to Cohen 7/18	8/3	513	9/22	2282
GG	Unedited material of management	8/3	543	9/22	2281
HH	Article about libel suit from the 7/13 edition of the Los Angeles examiner	9/19	1949	9/22	2281
II	Affidavit of Petersen				
JJ	Affidavit of Gira				
KK	Copy of libel complaint			9/20	2100

Exhibits	Description	Marked for Identification		Admitted in Evidence	
		Date	Page	Date	Page
LL	Financial reports	9/21	2111	9/21	2178
MM	Proxy statement mailed to the shareholders of Topp Industries Corporation	9/21	2111		
NN	Monthly report (financial statement)	9/21	2111		
AAA	Correction letter from Yaras	8/17	975	8/22	1011
BBB	Intercompany correspondence of	9/14	1738	9/14	1739
CCC	NIC from Gira to M. Bonner received on or about 9/19/60 concerning Permachem Corp.	9/14	1738	9/14	1739
DDD	Press release	9/14	1764		

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 17591

STANLEY E. HENWOOD, RICHARD I. ROEMER, LEWIS M. POE, individually, as members of the UNITED INDUSTRIAL CORPORATION STOCKHOLDERS' PROTECTIVE COMMITTEE and as proxies of said Committee, JAMES V. ARMOGIDA, ROBERT G. BALLANCE, FRED A. BESHARA, NATHANIEL R. DUMONT, JOE L. FOSS, WILLIAM D. LAWRY, ELMER M. LUTHER, JR., EDWARD H. McLAUGHLIN, CHARLES SODERSTROM, JOHN A. STEEL, CLARENCE L. SUMMERS, ROY L. WILLIAMS, LOUIS W. WULFE-KUHLER, ALFRED T. ZODDA, individually and as members of the UNITED INDUSTRIAL CORPORATION STOCKHOLDERS' PROTECTIVE COMMITTEE, BERNARD GIRA and HERBERT J. PETERSEN,

Appellants,

vs.

SECURITIES AND EXCHANGE COMMISSION and UNITED INDUSTRIAL CORPORATION,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF OF THE APPELLEE UNITED INDUSTRIAL CORPORATION

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RALPH L. HALPERN.

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INDUSTRIAL CORPORATION STOCKHOLDERS'
PROTECTIVE COMMITTEE, BERNARD GIRA and
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Appellants,

vs.

SECURITIES AND EXCHANGE COMMISSION and
UNITED INDUSTRIAL CORPORATION,

Appellees.

**BRIEF OF THE APPELLEE UNITED
INDUSTRIAL CORPORATION**

Jurisdictional Statement

This is an action instituted by the Securities and Ex-
change Commission pursuant to the provisions of Section
21(e) and Section 21(f) of the Securities Exchange Act

of 1934, 15 USC § 78u(e) and § 78u(f). The jurisdiction of the Court below arises under Section 27 of the Securities Exchange Act of 1934, 15 USC § 78aa, and the jurisdiction of this Court is founded on United States Judicial Code, 28 USC §§ 1291, 1294.

The complaint recites that the defendants, other than the defendant United Industrial Corporation, have engaged or are about to engage in acts and practices in violation of Section 14(a) of the Securities Exchange Act of 1934, 15 USC § 78n(a) and of Regulation 14, 17 CFR § 240.14a, prescribed by the Securities and Exchange Commission to govern the solicitation of proxies in respect of any security registered and listed on any national securities exchange. The complaint charges that the appellants, individually and as members of the United Industrial Corporation Stockholders' Protective Committee, have solicited proxies for use at the 1961 Annual Stockholders Meeting of the Corporation by means of statements which were false and misleading with respect to material facts and which *omitted* to state material facts. It specifies the failure of such proxy statements to disclose the part played by the defendants Gira, Petersen and Yaras in the initiation and organization of the Committee and their participation in the proxy solicitation in opposition to the existing management of the Corporation.

Statement of the Case

United Industrial Corporation (hereinafter sometimes referred to as "United" or the "Company"), a Delaware corporation, is an industrial complex engaged in the operation of various businesses through wholly owned subsidiaries and divisions located throughout the United States. The Company resulted from the merger on De-

ember 31, 1959 of United Industrial Corporation, an old line Michigan corporation, the stock of which had for many years been listed on the New York Stock Exchange, and Topp Industries Corporation, a company which had originally been organized in the State of California in 1951 by the defendants Gira and Petersen and was engaged principally in the electronics industry. All of the business and assets of Topp Industries Corporation, a Delaware corporation, were prior to October, 1959, owned and operated by Topp Industries, Inc., a California corporation.

Upon the consummation of the merger the operation of the Company was vested in the former principals of both Topp corporations. The defendant Gira, the former president of both Topp corporations, became the president and chief executive officer of United Industrial Corporation and the defendant Petersen, the former vice-president of both Topp corporations, became the executive vice-president of United Industrial Corporation. The Board of Directors was divided between the former directors and executives of Topp Industries and former directors of the old United Industrial Corporation. The common stock of the Company, of which more than 2,000,000 shares were outstanding, was listed for trading on the New York Stock Exchange and the preferred stock, of which over 1,000,000 shares were outstanding, was listed for trading on the American Stock Exchange. Warrants were also listed on the American Stock Exchange. All these securities in addition were listed on the Pacific Coast Stock Exchange (Ex. LL).

After consummation of the merger Gira and Petersen gradually moved the executive offices of the Company to Los Angeles, which had been the principal place of business of Topp Industries, Inc., and thereafter the opera-

tions of the Company were conducted from these offices. For the year ending December 31, 1960, the first fiscal year of its operations, the Company showed an operating loss in excess of \$6,000,000 (Ex. 13). Early in January of 1961 Arthur Young & Co., the Company's independent accountants, made a direct request to the Board of Directors that they be accorded an opportunity of appearing before the Board and disclosing information which had come to their attention requiring very substantial write-downs in the Company's assets, occasioned by material misstatements which had been made by officers of the Company in the interim financial statements and the evaluation by officers of the Company of certain inventories and deferred charges. A meeting of the Board of Directors was held in Los Angeles on January 12, 13 and 14, 1961. At the conclusion of this meeting the Board asked for and received the resignation of the defendants Gira and Petersen as officers and directors of the Company (R. 61, Ex. 33, p. 190)*. By order of the Board of Directors the preliminary findings of the independent accountants were made known to the Securities and Exchange Commission, the New York Stock Exchange, and to the financial institutions which had financed the Company. As a result of these disclosures trading in both the common and the preferred stock of the company was suspended. (Over-the-counter trading was resumed on September 22, 1961 pursuant to permission of the Securities and Exchange Commission. Trading of the Company's securities was resumed on the Pacific Coast Stock Exchange on November 16, 1961.)

As a consequence of these occurrences eight stockholders derivative actions have been instituted against the

* R. refers to Volume II of the Transcript of the Record (Reporter's Transcript).

Company and its former and present directors in the Courts of the State of Delaware and the Courts of the State of New York. The Company has also instituted an action in the Courts of the State of Delaware against Gira and Petersen and others. The annual meeting of the Company is appointed by its by-laws to be held on the second Wednesday in May of each year. The rules and regulations of the Securities and Exchange Commission require that the Company's Annual Report be furnished the stockholders at or prior to the time proxy solicitation is undertaken by the management in connection with the Annual Meeting. Rule X-14A-3(b), 17 CFR 240.14a-3(b). As a result of the conditions which were reflected in the preliminary findings reported by the Company's auditors, Arthur Young & Co. was unable to complete the annual audit and furnish certified financial statements until long after the date appointed for the Annual Meeting. Seeking to take advantage of this circumstance and to regain control of the Company, the defendants Gira and Petersen caused the formation of the so-called Stockholders' Protective Committee whose members are named as defendants in this action. The information of this Committee, the proxy solicitation it has undertaken and the participation of the defendants Gira and Petersen form the subject matters of this action.

Early in April of 1961 the Committee, having filed incomplete and misleading statements with the Securities and Exchange Commission, mailed to the stockholders of the Company proxy solicitation material, using a stockholders list which had been surreptitiously taken from the Company by Gira and Petersen. The falsity of this statement, the misrepresentations it contained and the material facts which it omitted were fully developed upon

the trial of this action and treated of in a later portion of this brief. Knowing full well that the management of the Company was foreclosed from soliciting proxies by virtue of the Securities and Exchange Commission's regulations and the unavailability of the audited Annual Report, the Committee instituted an action in the Court of Chancery for the State of Delaware to enjoin any postponement of the Annual Meeting and thus to assure the success of their attempt to regain control of the Company. The Securities and Exchange Commission expressed its view by letter to the Chancellor in this action on behalf of United and voiced its objection to this attempted perversion of its regulations. After a hearing on the merits, the Delaware Court of Chancery denied the relief sought by the Committee and sanctioned the necessary adjournment of the Annual Meeting.

Upon the dissemination of the false and misleading proxy statement the Corporation acted promptly to protect the interests of its stockholders. On April 25, 1961, some three months prior to the commencement of the instant case, it instituted an action in the United States District Court for the Western District of New York against these same defendants, with the exception of the defendants Yaras and Shafer. The complaint in the corporate action, just as the complaint in the case at bar, charged that the defendants were soliciting proxies for use at the 1961 Annual Meeting by false and misleading statements with respect to material facts and by omitting in their proxy statements certain material facts. The complaint in the corporate matter went on to specify failure of defendants' proxy material to disclose the connection of Gira and Petersen with the solicitation and their relationship with various members of the so-called

Stockholders' Committee and other participants in the solicitation. An injunction was sought to prevent the defendants from voting the proxies that they had obtained and from continuing to solicit proxies by false and misleading statements.

The defendants filed answers which were in effect general denials and the plaintiff corporation took immediate steps to progress the trial of the action by taking the depositions of the defendants Henwood and Roemer and noticed the depositions of substantially all of the other defendants. Thereupon the defendants made a motion to change the venue of the action to the United States District Court for the Southern District of California on the ground that the activities complained of were all centered in that district and the majority of the defendants resided therein. The United States District Court for the Western District of New York granted the defendants' motion and transferred the case to California. A day or two after the entry of the order transferring the case, the defendants served and filed amended answers which for the first time asserted a counterclaim alleging that an "Interim Report" issued by the management of the Company in response to the proxy solicitation of the Committee, together with a letter from the management of the Company which accompanied the Annual Report to the stockholders, were false and misleading and constituted an unlawful solicitation of proxies. The counterclaim went on to allege that the false and misleading character of the report and the letter consisted of statements connecting Gira and Petersen with the solicitation undertaken upon behalf of the Committee. A reading of the counterclaim makes clear that the transactions therein complained of emanated from the State of New York and that the convenience of all of

the parties would best be served by a trial within the State of New York of the additional issues raised in the counterclaim. It is, therefore, apparent that the attorneys for the defendants saw fit to withhold from the United States District Court for the Western District of New York the true nature of the litigation until they had succeeded in removing it from the Court's jurisdiction.

The case came on for hearing before the United States District Court for the Southern District of California on July 17. Plaintiff moved for a transfer of the case back to the Western District of New York in the light of the changed circumstances brought about by the interposition of the counterclaim. After hearing both sides the Court reserved decision on this motion. Thereupon the Court heard argument on the plaintiff's motion for a preliminary injunction which was predicated on affidavits and on the depositions that had been taken of certain of the defendants. During the course of the argument the Court informed counsel that he had been advised by the Pacific coast counsel for the Securities and Exchange Commission that the Commission was filing an action in the United States District Court for the Southern District of California to restrain the Stockholders' Protective Committee from soliciting proxies in violation of the Securities Exchange Act of 1934. The argument on the motion for a preliminary injunction and the testimony of witnesses sworn on behalf of the defendants was not concluded on July 18, 1961 and the matter was adjourned to July 25, 1961.

On July 21, 1961 the present action was instituted. In addition to the final judgment enjoining defendants from using proxies obtained through the medium of false and misleading statements the plaintiff Securities and Exchange Commission sought a temporary restraining order

and a preliminary injunction enjoining further solicitation of proxies by the Stockholders' Protective Committee and restraining the Company from holding the Annual Meeting until further order of the Court.

The hearing on the motion for a preliminary injunction in the Company's action was resumed on July 25, 1961. During the course of the hearing the action instituted by the Securities and Exchange Commission came before the Court and the attorneys for the Securities and Exchange Commission and the attorneys for the defendants appeared before the Court for the purpose of arguing the motion of the Securities and Exchange Commission for a temporary restraining order directed against the Committee. In the course of the colloquy the attorney for the Stockholders' Committee stated that it would be proper for the Court, which was hearing the Corporation's case, to undertake the hearing of both cases (R. 18a).

On July 26, 1961 the Court entered a temporary restraining order enjoining the holding of the Annual Meeting and the further solicitation of proxies by both the Company and the Committee. The Company consented to this order but the other defendants objected to it and insisted that the Securities and Exchange Commission proceed immediately with its proof in the action that it had instituted (R. 151a). Thereupon the Court adjourned the hearing on the Company's application for a preliminary injunction and proceeded immediately to the taking of the testimony in the instant case. During the course of the trial it was stipulated by all of the parties that the Court should consider the trial to be on the merits rather than on an application for a preliminary injunction (R. 1570, 1573, 1574). The taking of testimony continued from day to day with adjournments to accommodate the business of the Court

and was concluded on September 22, 1961. On October 3, 1961 the Court filed its decision and on October 18, 1961 the findings of fact and conclusions of law were filed and a final judgment was entered herein.

United was named as a defendant in this action solely for the purpose of enabling the Court to grant adequate relief by way of ordering an adjournment of the Annual Meeting of stockholders which was imminent at the time of the institution of the action. No other claim is made against the Company in this case (par. 5, Complaint; Appellants' Committee brief p. 7). Throughout this protracted litigation the Company has readily consented to successive adjournments of the Annual Meeting and although no such relief was prayed for in the complaint and it has not been charged with any wrongdoing in connection with the solicitation of proxies, the Company has also consented to the entry of orders prohibiting any further solicitation by Management while the restraining order against the Committee was still in effect (R. 19a, 20a). Consonant with its role as a nominal defendant the Company did not take an active part in the trial of the action. No proof was offered on its behalf and cross examination on its behalf was confined to clarification. This course was dictated in recognition of the paramount public interest represented by the Securities and Exchange Commission and by the further circumstances that as the trial developed it became apparent that the defense was founded in an attack upon the procedures and, indeed, the integrity of that Governmental agency (R. 883, 885, 893, 894, 1178).

Nonetheless the Company has a very vital interest in the outcome of this litigation because it profoundly affects private interests represented by the corporate business

and financial community and the fifteen thousand stockholders who own the company. It is these private interests that the Company sought to protect when, three months prior to the institution of the instant action, it commenced the action in the United States District Court for the Western District of New York, which was subsequently transferred to the United States District Court for the Southern District of California, and which is still pending. The record in this case and the judicial determination that has been made thereon in the public interest confirms the action it has taken in protection of the private interests it has a duty to represent.

ARGUMENT

POINT I

The record clearly supports the findings of fact.

The attacks upon the findings of fact by both sets of appellants must be analyzed and assessed in the light of the well established equitable rule of appellate review which has been incorporated in the Federal Rules of Civil Procedure, Rule 52(a):

“* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . * * *”

In *Stacher v. U. S.*, 258 F. 2d 112 (9th Cir. 1958), this Court said at page 116:

“Further, the government was the prevailing party below, and hence we must take that view of the evidence most favorable to it. Appellee is entitled to the benefit of all favorable inferences from the facts proved relative to the issue of residence. If, when so viewed, there was substantial evidence to sustain the find-

ings, then the judgment may not be reversed by this Court unless against the clear weight of the evidence or unless influenced by an erroneous view of the law.” See also *Joseph v. Donover*, 261 F. 2d 812 (9th Cir. 1958). It is the duty of this Court to accept the findings of fact made by the trial court once it has tested the record and found that there is credible evidence to support such findings. This is particularly true where, as in the case at bar, the record consists almost entirely of sworn testimony.

The line of cases cited by the appellants Gira and Petersen, such as *U. S. v. Parke Davis & Co.*, 362 U. S. 29 (1960), can have no application to the review of this record. In those cases the reviewing court relied on the well established power to review the application of legal standards and principles to factual situations which were virtually undisputed. In this case the judgment is predicated entirely on the determination by the trial court of disputed questions of fact and there is no substantial issue as to the legal consequences which must flow from the facts as determined by the court below.

The “clearly erroneous” test is not met by references to isolated words or phrases in particular findings. It involves an analysis of the record, the drawing of all inferences favorable to the prevailing party and an ultimate determination as to whether or not there is evidence which, if believed, would support the findings that have been made. The existence of a choice between permissible views of the weight of the evidence does not denote error. *U. S. v. Yellow Cab Co.*, 338 U. S. 338, 341 (1947).

Moreover, in the case at bar the record must be reviewed in the light of the circumstances that this litigation does not arise out of a controversy between interested private parties. On the contrary the case was commenced by the

Securities and Exchange Commission in the execution of its statutory duty under Section 21 of the Securities and Exchange Act of 1934 (15 U. S. C. § 78u). The determination of the Securities and Exchange Commission to institute this action was not made in a vacuum and represents the exercise of the expertise the agency has gained over a quarter of a century in the administration of this act of Congress. 2 Loss, Securities Regulation 784 (2d ed. 1961).

The appellants' criticisms of the findings of fact are fully met by a review of the record even without the favorable inferences to which appellees are entitled under the well established rule. See *Axelbank v. Rony*, 277 F. 2d 314, 316 (9th Cir. 1960). The strength of the record is emphasized by the fact that the great bulk of the testimony was adduced from the defendants themselves who were called as adverse witnesses.

a. Gira's Plan to Replace Directors

This contest for corporate control had its genesis during the period when Gira and Petersen were the chief executive officers of United Industrial Corporation. As early as December of 1960 the defendant Summers, who had been employed by Gira and Petersen as a public relations adviser of the corporation, prepared at the request of Gira a document outlining the procedure to be followed to replace certain unidentified directors (R. 2183).

b. Resignations of Gira and Petersen

This plan was forestalled by the forced resignations of Gira and Petersen as the chief executive officers and as directors of the Company at a meeting of the Board of Directors held on January 12, 13 and 14, 1961 (R. 61). This meeting was called at the request of the Company's inde-

pendent auditors, Arthur Young and Co., for the purpose of informing the Board of a pattern of material misstatements contained in the interim financial statements of the Company which substantially affected the valuation that had been placed on certain of the Company's assets. The Board of Directors felt constrained by the terms and conditions of the Company's listing agreement with the New York Stock Exchange, its loan agreement with the Bank of America and the rules and regulations of the Securities and Exchange Commission to report these facts to those interested parties. Gira and Petersen obviously disagreed violently with this decision and as a result their resignations were demanded (Brandlin Dep. 118, 119; R. 1206).

c. Discussions of Proxy Contest

Petersen and Gira did not waste any time in carrying forward their plans. They both retained separate counsel and had several discussions respecting the actions of the other members of the Board, of whom they were very critical (R. 71, Brandlin Dep. 118, 119). Petersen discussed the possibility of a proxy contest with the defendant Yaras (R. 146, 147). On January 25, 1961, approximately ten days after his resignation, Gira arranged a meeting at his home in Malibu with the defendant Roemer and Brandlin (R. 214, 215). He expressed dissatisfaction with the counsel he had retained and sought advice as to the steps that should be taken to protect his interests.

One of the two courses of action discussed at the meeting in Malibu was that of waging a proxy contest (R. 218, 260). There is some confusion as to whether Gira was advised at that time "that he as such should not engage in a proxy contest" (R. 357) or whether this advice was given to Gira by Brandlin and Roemer at a later date (R. 262, 263).

**d. Stockholders List Stolen and Delivered to Brandlin
for Duplication and to Wage Proxy Contest**

In any event Gira and Petersen two days thereafter delivered to the offices of Brandlin and Roemer the Company's stockholders list (R. 78, 220, 221). The stockholders list was delivered by Gira and Petersen because they were advised that such list would be necessary to wage a proxy contest (R. 72, 221, 222). This stockholders list was the only list available to the Company (R. 169). Such list contained the stockholders at December 30, 1960 and was ordered for the purpose of advising certain states of the number of stockholders residing therein at such date as required by the pertinent statutes (R. 161). The list, which consisted of approximately 750 pages (R. 170, 171), was reproduced in the offices of Brandlin and Roemer during the weekend of January 28 and 29, 1961 (R. 117) for the avowed purpose of a proxy fight (R. 1200, 1201). Roemer testified that the list was duplicated for Gira and Petersen and at that time Roemer and Brandlin had no other client who was interested in a proxy fight (R. 280, 355).

There is a sharp conflict in the evidence with respect to the circumstances surrounding the obtaining of the list. It is firmly established that the list was first received by the Company on January 14, 1961 (R. 198; Ex. 4). It was placed in a locked file and receipted for on January 18, 1961 (R. 188; Ex. 6). The list was used by employees of the Company between the time of its receipt and January 26, 1961 to prepare a report for the Ohio Department of Taxation (R. 190-193; Exs. 7 and 8).

Brantly, the Vice-President of U. S. Science, a United subsidiary, testified that during the week of January 16 Robert Gira, the brother of the defendant Bernard Gira,

requested him to secure the stockholders list and to remove it from the plant. Robert Gira described the location of the list and told him where the key was located (R. 54-57). He also assured Brantly that the list would be returned after it had been duplicated (R. 56). Brantly quite properly refused to take part in any such activity and reported the matter to his superior (R. 57). This testimony is unimpeached and stands uncontradicted. No explanation has been made of the failure of the defendant Gira to call his brother as a witness. The defendant Petersen testified that on January 14, 1961, the day of his resignation, he loaded the personal effects that were in his office in his station wagon and took them to his home (R. 69, 70). The following day while he was unloading the station wagon he discovered that this twenty-pound, two-volume stockholders list had just happened to be included among his personal belongings (R. 71). In the face of the testimony of the employees of the Company and the documentary evidence Petersen maintained that this list remained in his possession until he and Gira delivered it, pursuant to the request of Brandlin, to the law offices of Brandlin and the defendant Roemer on January 27, 1961 (R. 72).

As we have noted above, the task of duplicating this 750-page list was undertaken on Saturday and Sunday, January 28 and 29. On Sunday, January 29, at a time when the offices of United were closed, Brandlin personally returned the list (R. 1250), driving a considerable distance out of his way (R. 1182-3). Although the facilities of the Company are subject to diligently applied Navy and Air Force security regulations (R. 88, 89), Brandlin testified that he walked right into the plant and left the list on a secretary's desk (R. 1251). The list

contained no address, no letter of transmittal, nor any other indication, revealing that it had ever been taken from the plant (R. 1251, 1253-4). Moreover, although Brandlin realized that the list was the property of the Company, he did not conceive that it was incumbent upon him to advise the management of the Company that he had been in possession of it (R. 1251, 1252).

The fact that the list was surreptitiously removed from the premises of the Company—and in fact was stolen—becomes clear beyond peradventure when it is realized that Brandlin returned the list not to Gira or Petersen but to the Company after it had been duplicated.

e. Formation of so-called "Committee"

Within four days of the meeting at Malibu, Brandlin, spurred on by Gira, had determined to put together a slate to wage a proxy contest (R. 1201) and the stockholders list had been procured and duplicated (R. 1200). Gira had been advised that he "as such" should not wage a proxy contest (R. 357) and he agreed with Roemer's and Brandlin's analysis of the situation (Brandlin Dep. 33, 34, 35). Gira, however, inquired of Roemer and Brandlin whether they would be interested in handling the proxy contest if other stockholders came to them and requested that they set up an organization and conduct a contest for control of United (R. 1248, 1249). Roemer and Brandlin expressed an interest and at that point Gira advised them that he would make the stockholders list available (R. 1249, 1250).

Shortly thereafter the defendant Summers, who had formerly been Gira's public relations man and who was the author of the original plan to replace directors, called

on Roemer and said that he had been advised by Petersen that the law firm was going to undertake a proxy contest and might require his services (R. 2181). Summers not only became a member of the Committee, but he also produced another Committee member, Dumont, a long standing friend and business associate of Gira's (R. 1726, 1727). Yaras, the financial consultant of Gira and Petersen, who had previously discussed a proxy contest with Petersen, next called on Brandlin and expressed interest in the undertaking (R. 1224). Yaras was eventually left off the Committee because of the fact that he had at one time been in bankruptcy (R. 1239).

Williams, Gira's uncle, was next referred to Roemer by Gira (R. 1095). Although he had never met Roemer, he called him on the phone with the suggestion of Gira and stated that he was interested in trying to find out what had happened to the stock (R. 1095, 1096). Until Williams received from Roemer Form 14-B which was required by the Securities and Exchange Commission, he didn't have any idea what was going on (R. 1103). He testified that he knew "absolutely nothing about the committee" and at no time authorized Roemer or anyone else to conduct a proxy contest on his behalf (R. 1115, 1120, 1121).

Elmer Luther, a discharged former employee of the Company and a personal friend of Petersen and Gira, was referred to Roemer by Yaras (R. 1037, 1039, 1040). In the course of his deposition he testified that he was not a member of the Committee and he did not know who was making the decisions for the Committee (R. 1036, 1047). Luther testified further that he never authorized Roemer to engage in a proxy contest on his behalf (R. 1075, 1076), and in fact had not contacted him until the first part of March (R. 1041). Parenthetically, it is noted that even

as late as the trial of this action, neither Brandlin nor Roemer had ever seen either Luther or Williams (R. 372, 1278).

The Committee's proxy material (Ex. 13) carefully omits any reference to the direct connection of Gira and Petersen with the formation of the Committee and fails to disclose the peculiar circumstances under which the stockholders list was obtained. The Committee's initial proxy material contains the following statement:

"The formation of the Stockholders' Protective Committee started after Richard I. Roemer, a member of the Committee, a nominee for director, and a partner in the law firm representing the Committee, received complaints from stockholders Elmer M. Luther, Jr., a former employee of a subsidiary of the company, and Roy L. Williams, B. F. Gira's uncle, who own respectively 250 and 400 shares of the common stock of your company. They complained about the decrease in market value of the stock, its suspension from trading, and the apparent internal conflict within the board of directors. These two stockholders requested Mr. Roemer to take whatever steps were necessary to form a new slate of directors and provide your company with new management.

"This was done by contacting men whom the organizers of the slate considered to be leaders in industry, business and the professions. The selection was made with the qualifications of the individual as the primary consideration and, secondly, his stockholdings in the company."

Thus it appears from the foregoing passage of the Committee's proxy statement that Luther and Williams were the moving parties and that Gira and Petersen had nothing to do with the formation of the Committee. This impression is further sought to be created among the stockholders by the statement in the next paragraph of the Committee's proxy statement which reads in part as follows:

“They (Gira and Petersen) stated that they were not interested in waging a proxy contest but they did furnish the committee with information concerning the company including a stockholders list.”

The failure to reveal the fact that Gira and Petersen made such statements if indeed they did, only after Gira had been advised that he “as such” was in no position to bring the proxy contest himself, makes the material clearly misleading under the proxy rules of the Securities and Exchange Commission (Reg. X-14A ; 17 CFR §240.14a). Gira himself was obliged to admit that at the meeting at his home the subject of a proxy contest was discussed as one of a series of actions that might be instituted *in his behalf* (R. 394). The situation is further aggravated by the sentence in the Committee’s proxy material that “the law firm of Vaughan, Brandlin & Baggot”, in which Messrs. Brandlin and Roemer are partners, “does not represent Messrs. Gira and Petersen, nor are Messrs. Gira and Petersen members of the Committee”. Certainly stockholders solicited to vote for the Committee were entitled to know that the lawyers who were organizing the Committee and were claiming to do so in behalf of Luther and Williams were the lawyers selected by the defendant Gira to advise him concerning a proxy fight and that they had advised him that it would not be wise for him “as such” to bring the proxy contest (R. 357).

The testimony and exhibits further establish the fact that the “Committee” exist in name only, that it held no meetings other than a social gathering attended by less than half of its members at the Los Angeles Country Club (R. 1710, 1711, 1713), has formulated no plans and exists only for the purpose of the proxy fight. Particular attention is invited to the testimony of the defendant Henwood

who was described in the Committee's proxy solicitation material as the chairman of the Committee. Henwood said that the Committee never met to elect him chairman, or for any other purpose. His amazing account of the Committee, its organization and activities—or, rather, the lack of them—given in his deposition testimony in *United Industrial Corporation, et ux. v. Stanley E. Henwood, et al.*, and which is designated part of the record herein, is, in brief, as follows.

In a telephone conversation with Brandlin, in the latter part of January, 1961 (evidently a few days after Brandlin's and Roemer's conversation with Gira at Gira's home), Brandlin said to Henwood, "How would you like to get into a proxy fight?" (Henwood dep. 9). Henwood testified that Brandlin did not mention the name of the company involved and, importantly, Henwood said that Brandlin stated that he "didn't know whether he had a client or not" (Henwood dep. 9). Henwood claims not to have given a definite answer at that time but later, when the time came that Brandlin told him "he had a client", Henwood indicated that he would join the fight (Henwood dep. 13). Importantly, Henwood testified that at the time he agreed to become a participant he didn't know who Mr. Brandlin's client was (Henwood dep. 15). He said that he knew nothing about United at the time (Henwood dep. 15). Henwood's deposition was taken on May 5, 1961 and as of that time he had "never seen a financial statement of United Industrial Corporation nor had he asked to see one" (Henwood dep. 16). As of that date, he did not "know anything about its assets or its liabilities". He had never received nor asked for a balance sheet or earning statement (Henwood dep. 17). At the time he agreed to become a member of the Committee, Henwood didn't know

whether the Company was making or losing money (Henwood dep. 18) and further he did not know whether the Company had a "substantial net worth or whether it was insolvent" (Henwood dep. 18). Henwood said that he simply did a "favor for Brandlin" in "lending" his name to the Committee (Henwood dep. 19). He said the Committee had no plan or program, except to "win the proxy fight" (Henwood dep. 19). Henwood said that if the Committee should win the proxy fight, it will get together and see if it could get up a plan (Henwood dep. 20). Laconically, Henwood stated that "if any other member of either the Committee or the slate has any plans, they have not communicated them" to him (Henwood dep. 211).

It is significant that Henwood agreed to serve as chairman of the so-called Committee the day following his meeting with Gira and Petersen on February 27, 1961 (R. 287-293; 1674).

The defendants Armogida and Beshara had become stockholders in United by virtue of its acquisition of the Perry Rubber Company in which they had been large stockholders. Both of them were acquainted with Gira who had negotiated the merger (R. 2050, 2055). They were contacted by Brandlin who made a trip to Canton, Ohio for that purpose (R. 2050, 2052).

The defendant Ballance had been a stockholder in Topp Industries and was acquainted with Gira. He was also a stockholder in another company that had developed a product which Ballance was trying to sell to Perry Rubber Company, a United subsidiary. Gira had introduced Ballance to the Perry Rubber Company as his good friend (Exs. BBB, CCC). Brandlin contacted him to serve on the Committee.

The balance of the Committee was made up of persons recruited by Brandlin, Roemer, Henwood and Summers. None of them had ever held stock in United or had any other interest in the Company or any knowledge of its operations (Ex. 13).

f. Subsequent Activities of Gira and Petersen

The interest of Gira and Petersen in the proxy contest did not end upon the formation of the Committee. After they had furnished the stockholders list they met with Roemer and Brandlin on at least six occasions (R. 255, Brandlin dep. 48-68). In addition, there were numerous phone conferences (Brandlin dep. 67).

Early in February Gira and Petersen analyzed for Brandlin and Roemer the distribution of United stock and the larger stockholdings (R. 80, 372, 373; Brandlin dep. 48). At a later meeting Gira and Petersen advised Brandlin and Roemer on the details of the proposed sale by United to its subsidiary U. S. Semi-Conductor because it was felt that this transaction might be of importance in the Committee's solicitation of proxies (Brandlin dep. 49, 50). A further meeting was held with Gira, Petersen, Robert Gira and Kendrick, the lawyer whom Brandlin had recommended to Gira (Brandlin dep. 60, 66). At this meeting there was discussion of the action the Committee had instituted in Delaware to prevent the Company from adjourning the annual meeting pending the preparation of the auditors' reports (Brandlin dep. 60, 61). As we have noted above, this action was designed to take advantage of the restriction of proxy solicitation upon the part of Management until the Annual Report was available to stockholders.

A subsequent meeting was held to discuss the steps that should be taken to meet Management's claim that Gira and Petersen were connected with the Committee. At this meeting Brandlin first suggested to Gira and Petersen and their lawyer a libel suit and asked them to threaten the United Board of Directors with such an action (R. 1263, 1264; Brandlin dep. 64).

In the latter part of February Brandlin arranged a meeting between Gira and Petersen and the defendant Henwood at the Town House in Los Angeles (R. 288, 1264; Brandlin dep. 68). Brandlin had previously advised Henwood that Gira was a very high type man and had spoken well of his integrity and ability (Henwood dep. 47). At this meeting Gira gave Henwood a complete description of the Company's business and its prospects (R. 292; Brandlin dep. 68, 69). It is of some significance that the day after the meeting Henwood agreed to buy some United stock and serve on the Committee (R. 1674; Henwood dep. 54, 60, 61, 62).

The assistance rendered the Committee by Gira and Petersen was not limited to conferences. Early in February they retained Bud Lewis, a public relations consultant formerly employed by United, and issued a press release designed to answer a Wall Street Journal article on the suspension of trading of United stock (R. 632; Exs. 23 and 24). In the press release Gira and Petersen characterized the management of the Company as "interim" and expressed dissatisfaction with it (Ex. 23). Gira prepared for the Committee a comprehensive study of United (R. 400) and furnished the Committee with the so-called "Bishop reports" which purported to contain derogatory information on two of the present directors of United (R. 348; Brandlin dep. 119). In the midst of the proxy con-

test Gira and Peterson prepared a lengthy letter to the stockholders which was highly critical of the management of the Company (Ex. 20). Although this letter disclaimed their participation in the proxy contest, it was clearly a solicitation of proxies. The letter was not mailed when the Securities and Exchange Commission advised counsel for Gira and Petersen that it would be deemed a solicitation.

g. Timing of Libel Suit

Finally, fifteen days prior to the date of the adjourned annual meeting Gira and Petersen instituted the libel action which had originally been recommended by Brandlin at an earlier meeting (Ex. KK; R. 1263, 1264; Brandlin dep. 64). The action was not brought against the Directors of United who would have authorized the publication of the material claimed to be libellous but rather against the persons who comprised the management slate (Ex. KK). Prior to the filing of this lawsuit Gira and Petersen cleared a press release prepared by Lewis (R. 649). This release describes the proxy fight in detail and sets forth the names of the Committee's slate of directors (Ex. 19) and was designed and intended to offset the management proxy material (R. 651, 652). Although both Gira and Petersen had been advised that this press release could not be issued until it had been "cleared" with the Securities and Exchange Commission, it was in fact released by their public relations man, Lewis, without such S. E. C. clearance (R. 631).

h. Summary

The above-described activities of Gira and Petersen cannot be reconciled with the disclaimer in the Committee's proxy material (Ex. 13) of any connection with them.

Moreover, a comparison of the roles played by Gira and Petersen with the lack of interest evidenced by Luther and Williams belies the statement in the proxy material that they were the originators of this undertaking.

In keeping with the Company's status in this litigation as a nominal party, no attempt is made in this brief to make a point by point reply to the arguments advanced upon behalf of the appellants herein. An analysis of the record in the light of the appellants' contentions demonstrates that the Findings of Fact upon which the judgment is predicated are amply supported by the evidence and more than meet the standards adopted by the Federal Rules of Civil Procedure with respect to appellate review.

POINT II

Omissions from "Committee's" proxy material.

Appellants' argument that the proxy contest here involved should be considered akin to a political campaign (R. 1288) is entirely without merit. This motion has been laid to rest in a clear and succinct opinion by Chief Judge Clark of the Second Circuit in *S. E. C. v. May*, 229 F. 2d 123, 124 (2d Cir. 1956) where he stated:

"Appellants' fundamental complaint appears to be that stockholder disputes should be viewed in the eyes of the law just as are political contests, with each side free to hurl charges with comparative unrestraint, the assumption being that the opposing side is then at liberty to refute and thus effectively deflate the 'campaign oratory' of its adversary. Such, however, was not the policy of Congress as enacted in the Securities Exchange Act. There Congress has clearly entrusted to the Commission the duty of protecting the investing public against misleading statements made in the course of a struggle for corporate control."

Rule X-14A-9 (17 CFR § 240.14a-9) of the S. E. C. provides:

“No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.”

The main thrust, of course, of the omissions is the failure of the Committee's proxy material to reveal the true relationship between Gira and Petersen on the one hand and the Committee and Brandlin on the other. This relationship has been developed in detail in Point I of this brief and will not be repeated here. However, we do set forth at this point a summary of the omissions. The uncontradicted testimony of Alan R. Gordon, a long time member of the staff of the Securities and Exchange Commission (R. 447), clearly and succinctly describes the patent violations of the above quoted Rule X-14A-9 (R. 693-709, 717, 761). He was asked by one of the counsel for the appellants to relate the areas of omission to disclose material facts necessary to make the statements made by the Committee not misleading (R. 693). In reply to such inquiry he testified in detail with respect to such omissions which we briefly set forth.

1. The *circumstances* under which the stockholders list was obtained by and furnished to the Committee was not disclosed (R. 695).

2. The statement in the Committee's proxy material (Ex. 13) concerning the origins of the contest states that two thousand shares of United stock had been obtained by the defendant Roemer from the defendant Yaras and that a thousand of those shares had been split among ten of the Committee's candidates. *It says that, but it says no more.* It does not state that Mr. Yaras had contacted the attorneys for the Committee as a complainant to inquire about the possibilities of a contest or other action prior to the formation of the Committee (R. 696).

3. The fact that Gira and Petersen issued a press release in February, 1961 through Mr. Lewis relating to the Company's affairs at about the time of the inception of the contest is not disclosed (R. 696).

4. The relationship between Messrs. Gira and Petersen and the law firm of Vaughan, Brandlin and Baggot is not adequately disclosed in accordance with the facts as previously outlined (R. 696, 697).

5. Roemer's close and intimate association with Gira and Petersen is omitted (R. 704).

6. The proxy statement of the Committee fails to disclose that the defendant Summers had been contacted by Petersen and referred to Vaughan, Brandlin and Baggot and that Summers in turn had suggested to the defendant Dumont to get in touch with such firm (R. 707).

7. Such proxy material should have disclosed that toward the end of February, 1961 a meeting was arranged by Brandlin between Henwood and Gira and Petersen. At the time Henwood was not yet the chairman of the Committee. The following day, however, he agreed to serve in that position, to buy stock in United and to provide funds for the waging of a proxy contest (R. 708).

8. The proxy statement should have disclosed that the steps or acts necessary to wage a proxy contest had been performed by the law firm of Vaughan, Brandlin and Baggot, namely, seeking out and finding persons to stand as members of the slate, arranging the financing of the contest, the payment of certain bills of the Committee, authorizing the solicitation material which was used by the Committee, and in general managing the contest (R. 708).

9. The proxy material should have further disclosed that the nominal chairman of the Committee, Mr. Henwood, had had little participation in these matters and even less knowledge of them; that the Committee, so-called, in actuality consists of the persons found or selected by others to stand as a slate for election to office plus two other individuals, Luther and Williams. The Committee, *as such*, had not itself conducted the contest (R. 708).

10. Not only does the Committee's material fail to disclose the circumstances surrounding the obtaining of the stockholders list but further fails to disclose how the law firm rid itself of the list (R. 761).

The foregoing touches but the highlights of the omissions. There are other and equally material omissions but for the purposes of this brief and the demonstration being made at this point, the examples that are enumerated make it sufficiently clear that there have not only been omissions but there has been a deliberate pattern of material omissions from the Committee's proxy material.

This case does not turn on the narrow line of whether Gira and Petersen are formal or acknowledged members of the Committee but on the question of whether they have materially contributed to or assisted in bringing about the proxy contest, whether they are admitted members of the

Committee or not. To say that Gira and Petersen are not participants in the proxy contest and have not made solicitations is merely to pervert the rules of the Securities and Exchange Commission. Each rule was adopted with a particular purpose in mind. One may not avoid the impact of the rule by becoming a secret or undisclosed member of a committee; nor may one avoid the duties that fall upon a participant by setting the committee in operation and then disavowing that fact and disavowing all further activities. *Central Foundry Co. v. Gondelman*, 166 F. Supp. 429 (S. D. N. Y. 1958).

Rule X-14A-11(b), 17 CFR § 240.14a-11(b) provides that a participant, among others, includes any member of a committee or group, and any person *whether or not named as a member* who, acting alone or with one or more other persons, directly or indirectly, takes the initiative *in organizing*, directing or financing any such committee or group and it also includes any person who solicits proxies. Rule X-14A-1, 17 CFR § 240.14a-1 includes within the definition of "solicit" and "solicitation" the furnishing of a communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy. Gira's press releases of February 7, 1961 (Ex. 23) and July 12, 1961 (Ex. 19) were designed for the purpose of procuring proxies for the Committee and the withholding of proxies from Management (R. 641, 642). The seed from which the Committee sprouted was planted in Brandlin's office by Gira. Gira's press agent in this instance was one Bud Lewis who testified that both the February 7, 1961 press release referring to the management of United as "interim management" and the press release with respect to Gira's carefully timed libel suit of July 12, 1961 were both "cleared" by Gira (R. 637,

638, 649). Lewis further testified that the February 7th press release was an accurate statement of Gira's intention (R. 641, 642) and that at the time the release was issued Lewis desired to be employed by United. The only way that he could be employed by United was for Gira and the Committee to gain control of the Company. The press release was addressed to the stockholders of United with the avowed intent to offset Management's proxy solicitation (R. 651, 652). It is important to note that Gira's libel suit was timed in such a manner that the press release would be published fifteen days prior to the scheduled stockholders meeting. The complaint in such libel action is directed not against the incumbent members of the Company's Board of Directors who were the individuals who would have authorized the dissemination of the Company's proxy material, but instead the libel suit is directed against the nominees of Management (Ex. KK).

The fact that the suit is directed against the nominees, of course, serves the purpose of Gira very neatly, much more so than if it were directed against individuals who were not part of Management's slate but nevertheless were incumbent directors.

Appellants in order to comply with the proxy rules should have made the disclosures required of them.

POINT III

Trial Court granted appropriate relief.

The judgment of the trial Court contains four operative paragraphs which provide:

1. The Committee, its proxies, agents, employees and attorneys, Gira and Petersen are enjoined from directly

or indirectly soliciting proxies of stockholders of United unless certain specified omissions from earlier material are contained therein and unless certain specified misrepresentations in such earlier material are corrected (C. T. 238, 239)*, and from voting any proxies obtained prior to the entry of the decree (C. T. 239, 240).

2. Gira and Petersen are directed to file a corrected Schedule 14B as required by Rule X-14A-11, 17 CFR § 240.14a-11 (C. T. 240).

3. United, its officers, directors, employees and attorneys are enjoined from holding any stockholders meeting until 34 days after the entry of the decree** (C. T. 240).

4. The complaint is dismissed without prejudice as to the members of the Committee other than its proxies and Gira and Petersen (C. T. 240, 241).

It appears that the appellants have appealed from the first two operative paragraphs of the judgment; the preceding points of this brief have developed the violations of the Securities Exchange Act of 1934, 15 U. S. C. §78a, *et seq.* and the proxy rules promulgated thereunder. Reg. X-14A, 17 CFR 240.14a.

There is authority for the relief granted by the Court. In *Central Foundry Co. v. Gondelman*, 166 F. Supp. 429, 446 (S. D. N. Y. 1958) *mod. sub nom. S. E. C. v. Central Foundry Co.*, 167 F. Supp. 821 (S. D. N. Y. 1958), in consolidated actions brought against an insurgent committee by both management and the Commission, the Court declared the proxies void, adjourned the meeting to permit ample time for resolicitation, and spelled out precisely the

* C. T. refers to Volume I of the Transcript of the Record (Clerk's Transcript).

** This Court has enjoined the holding of such meeting until its further order.

corrective statement to be included in the next piece of proxy material. The Court ordered that the opposition committee clearly state in the next piece of proxy material (1) that the resolicitation had become necessary because of the Court's determination in an action brought by the company and the S. E. C. that the committee's earlier solicitations, written and oral, had been materially misleading and unlawful, and (2) that the statements in an earlier letter of the management to the effect that a referee had recommended that the organizer of the committee be exonerated from his disbarment had been included because the S. E. C. had so insisted on the basis of false information given to it by the committee. The Court adopted this procedure after having rejected the procedure which would have permitted the defendant committee to merely distribute a correction. The Court thought that this was not the relief best calculated to protect investors, because it would place the onus on the stockholders to revoke their proxies. See also 2 Loss, Securities Regulation 956-960 (2d ed. 1961).

We note at this point that the Committee claims to have had approximately 1,100,000 votes after its third mailing (R. 1293), and as a result became, as they put it very cooperative with the Securities and Exchange Commission, and obeyed its rules. What the appellants fail to disclose in their testimony and argument are the facts that these proxies were solicited by the use of false and misleading proxy material and that, moreover, these proxies were obtained at a time when United had not commenced to solicit proxies nor had forms of proxies on behalf of management been mailed to its stockholders (Exs. 13, 14). The form of proxy was not mailed by management until June 26, 1961 (Ex. 14), whereas the Committee had already at

that time mailed its so-called report No. 1 dated March 27, 1961, its report No. 2, and its report No. 3 dated May 26, 1961 (Ex. 13). There were eligible 2,642,148 votes to be cast at the stockholders meeting (Ex. 14). Since management commenced its solicitation of proxies it has received substantially in excess of 1,200,000 and the proxies of the Committee have been substantially reduced by those running to management revoking the earlier ones held by the Committee.

Needless to say the proxy rules of the Securities and Exchange Commission must be meticulously followed, whether one has what it considers sufficient proxies to carry the day, or whether it is merely commencing its solicitation. In any event, it is amply demonstrated that the appellants have flagrantly violated the rules and the number of proxies they hold is of no consequence.

The relief formulated by the Court permitting the Committee to resolicit is a remedy that they cannot complain of. If all the facts are revealed to the stockholders and the Committee is given an opportunity to resolicit, they cannot be injured. As wrong-doers the relief granted accords to the appellants an opportunity that equity does not generally reserve for wrong-doers.

The trial Court in its decision (C. T. 186) stated its reason for dismissing the complaint without prejudice as to certain of the defendants. Such defendants, it stated, were "shielded from knowledge of the misleading nature of the solicitation materials distributed in their names." Although scienter is not a requirement under the S. E. C. proxy rules, the Court, sitting in equity, felt that in its discretion the relief sought by the Securities and Exchange Commission could be adequately accomplished by the re-

straint placed upon the Committee, its proxies, agents, employees and attorneys. Rule 65(d) of the Federal Rules of Civil Procedure of course provides that every order granting an injunction is binding upon "the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order." Thus it is clear that the parties with respect to whom the complaint was dismissed were not even indispensable parties at the commencement of the action but were merely proper parties. There is serious doubt whether such individuals have standing to make this appeal. *Bryan v. Smith*, 174 F. 2d 212, 214 (7th Cir. 1949).

CONCLUSION

It is submitted that the trial Court properly found that the Committee failed to make adequate disclosures under the proxy rules and as a result thereof the proxies heretofore obtained by the Committee were properly invalidated. There remains no doubt from a reading of the record that Gira and Petersen were the prime movers behind the Committee and they in fact planted its seed.

Counsel for the Committee have made the argument that Gira is not seeking re-employment by United. Whatever the fact may be in this regard, the Court's attention is invited to the fact that United has brought action against Gira and Petersen among other things to recover substantial sums of money as a result of alleged wrongdoing on the part of Gira and Petersen which it is claimed damaged United. Moreover, Gira and Petersen are named defendants in numerous stockholders derivative suits pending in both New York and Delaware for alleged wrongs committed against United. Accordingly, the defendants Gira

and Petersen have motives more powerful than mere employment to see that management of United is in hands friendly to them. A reading of the Committee's proxy solicitation material will make clear that neither the Committee nor its slate has any disposition to vigorously assert the claims of United against the defendants Gira and Petersen.

For the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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